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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-453

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants,

against

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Appellees.

ABE LAVINE, individually and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Appellants,

against

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	3
Regulations Involved	4
Questions Presented	5
Statement of the Case	6
A. The New York Shelter Allowance Program	6
B. The Facts	11
Appellee Hurley	11
Appellee Taylor	13
Appellee Otey	14
Applicants for Intervention	15
Phyllis D'Alessio	15
C. Proceedings Prior to Remand	18
D. Proceedings Upon Remand	22
Argument	27
A. The pro-ration of shelter cost among all persons living in a common household and the exclusion of the non-paying lodger's share from shelter allowance payments pursuant to 18 N.Y.C.R.R. § 352.30(d) do not raise any irrebuttable presumption in violation of the recipient's rights to due process of law	28

PAGE

B. 18 N.Y.C.R.R. § 352.30(d) does not violate recipients' rights to equal protection of the laws in distinguishing between recipients who live without lodgers and those who live with either non-paying lodgers or paying lodgers 34

C. The district court erred in refusing evidence of substantial "contributions" of furnishings made to appellee Hurley by her non-paying lodger. The contributions were relevant to the capacity of the lodger to pay his share of the rent and illustrative of the purposes of § 352.30(d) 39

D. The District Court erred in refusing to dismiss the claims of appellees Taylor and Otey which had become non-justiciable during the course of the proceedings 41

E. The district court erred in defining the class to include recipients who share households with paying lodgers as will recipients who share households with non-paying lodgers and in invalidating § 352.30(d) in its entirety 43

Conclusion 44

TABLE OF CASES

Bailey v. *Patterson*, 396 U.S. 31 (1962) 42, 43

Battle v. *Lavine*, —— AD 2d —— (2nd Dept. 1974), rev'g a State Supreme Court decision (Index No. 7385/73) 10

Boucher v. *Minter*, 349 F. Supp. 1240 [D. Mass. 1972 (3 judge court)] 7, 8, 32

Cleveland Board of Education v. *La Fleur*, 414 U.S. 632 (1974) 29, 33, 36

PAGE

De Funis v. *Odegaard*, —— U.S. ——, 40 L.Ed. 2d 164 (1974) 42

Dandridge v. *Williams*, 397 U.S. 471 (1970) 35

Dullea v. *Ott*, 316 F.Supp. 1273 (D. Mass. 1970) 32

Gaddis v. *Wyman*, 304 F. Supp. 713 (S.D.N.Y. 1969) 42

Garther v. *Sterret*, 346 F. Supp. 1095 (N.D. Ind.), aff'd 409 U.S. 1070 (1972) 34

Gilliard v. *Craig*, 331 F. Supp. 587 (W.D. N.C.), aff'd 409 U.S. 807 (1972) 32

Golden v. *Zwickler*, 394 U.S. 103 (1969) 42

Goosby v. *Osser*, 409 U.S. 512 (1973) 41

Hagans v. *Wyman*, —— U.S. ——, 42 U.S.L.W. 4381 (March 25, 1974) 19

Hall v. *Beals*, 396 U.S. 45 (1969) 42

Hurley v. *Van Lare*, 365 F. Supp. 186 .....3, 10, 17, 18, 19, 22, 24

Jefferson v. *Hackney*, 406 U.S. 535 (1972) 35

Kahn v. *Shevin*, —— U.S. ——, 42 U.S.L.W. 4591 (April 24, 1974) 35

King v. *Smith*, 392 U.S. 309 (1970) 34, 37

Lewis v. *Martin*, 397 U.S. 522 (1970) 34

Richardson v. *Ramirez*, —— U.S.—— 42 L.Ed. 2d 551 (1974) 42

Rosado v. *Wyman*, 397 U.S. 397 (1970) 19

Snell v. *Wyman*, 281 F.Supp. 853 (S.D.N.Y. 1968), aff'd —— U.S. —— (19) 37

Solomon v. *Shapiro*, 300 F. Supp. 403 (D. Conn.), aff'd 396 U.S. 5 (1969) 34

PAGE

Stanley v. *Illinois*, 405 U.S. 645 (1972) 30

Taylor v. *Lavine*, —— F. 2d ——, Doc. Nos. 669 and 701, May 14, 1974, Slip op. p. 3470 (Oakes, C. J. dissenting 2, 3

Taylor v. *Lavine* (Doc. No. 74-5054) 3, 18, 20, 22, 24, 26, 28, 41

Village of Belle Terre v. *Boraas*, —— U.S. ——, 42 U.S.L.W. 4475 (April 1, 1974) 38

United States Department of Agriculture v. *Murry*, 413 U.S. 508 (1973) 30

Vlandis v. *Kline*, 412 U.S. 441 (1973) 23, 24, 29, 33

X v. *McCorkle*, 333 F. Supp. 1109 (N.D. N.J. 1970), aff'd per curiam *sub nom. Engelman* v. *Amos*, 404 U.S. 73 (1971) 34

STATUTES AND RULES CITED

18 N.Y.C.R.R.

§ 352.1 7

§ 352.2 ..... 6, 10

§ 352.3 .....7, 10, 11, 33

§ 352.4 ..... 6, 7

§ 352.7 29

§ 352.30(d) ..2,4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 18, 19, 20, 22, 23, 24, 26, 27, 28, 29, 30, 31, 33, 35, 36, 37, 39, 40, 41, 43

§ 352.31(a)(3)(iv) 2, 4, 5, 6, 8, 18, 19, 20, 43

§ 358 10

PAGE

28 U.S.C.

§ 1253 3

§ 1343(3) 4, 18

§ 1343(4) 4, 18

§ 2281 41

42 U.S.C.

§ 601 29

§ 602(a)(10) 18, 24, 29

§ 606 .....24, 29, 32

§ 609 38

§ 630 38

§ 1983 ..... 4, 18

45 C.F.R. § 233.90(a) 18, 37

Social Services Law

§ 131-a subds. 1 and 2 .....6, 7, 29, 32

§ 343 32

Rule 12, Rules of the Supreme Court of the United States 7

MISCELLANEOUS

Simplified Methods for Determining Needs, Method II, HEW 1964 7

IN THE

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OCTOBER TERM, 1974

No.

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

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ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Appellees.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

JURISDICTIONAL STATEMENT

The Commissioner and former Acting Commissioner of the New York State Department of Social Services (hereinafter "appellants") appeal from a Judgment and Order of a three-judge district court (HAYS, C. J., dissenting) for the Southern and Eastern Districts of New York entered in the above consolidated actions on August 15, 1974. The ac-

tions were heard by the three-judge district court upon remand from the United States Court of Appeals for the Second Circuit "to consider the constitutional issues raised by appellees [plaintiffs below]." *Taylor* v. *Lavine*, —— F 2d ——, Doc. Nos. 669 & 701, May 14, 1974, Slip op. p. 3470 (OAKES, C.J. dissenting). A Petition for a Writ of Certiorari to review the Second Circuit decision was filed in this Court on August 2, 1974 (Doc. No. 74-5054).

The Judgment and Order of August 15, 1974 declares 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv) unconstitutional under the Due Process Clause of the Fourteenth Amendment and permanently enjoins their enforcement. The portions of the regulations placed in issue below by appellees authorize the pro-ration of shelter allowances payable to public assistance recipients upon a factual finding that a non-paying ("non-contributing") lodger who is neither an applicant nor a recipient under the terms of the regulations is sharing living quarters with a recipient. The recipient's share of shelter cost is then paid from public funds while the non-recipient lodger's share is excluded. In invalidating the regulations, the district court majority found that the separation and exclusion of the lodger's share irrebuttably presumed that the recipient's need for public assistance and for living space had diminished because of the presence of the lodger and that such presumptions were potentially inconsistent with the recipient's individual circumstances.

Opinions Below

The majority and dissenting opinions of the three-judge district court on remand from the Second Circuit, dated August 5, 1974, are unreported and are reproduced in Appendix "A" to this Jurisdictional Statement. They are also reproduced in Appendix "A" to the Supplement to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit in *Taylor* v. *Lavine* (Doc. No. 74-5054) filed in this Court on or about August 25, 1974.

The majority and dissenting opinions of the United States Court of Appeals for the Second Circuit, dated May 14, 1974, are unreported and are reproduced in Appendix "B" to this Jurisdictional Statement. They are also reproduced in the Appendix to the Petition for Certiorari in *Taylor* v. *Lavine* (Doc. No. 74-5054) filed in this Court on or about August 2, 1974.

The opinion of the United States District Court for the Southern District of New York in *Hurley* v. *Van Lare* (BAUMAN, D.J.), dated October 3, 1973, is reported at 365 F. Supp. 186 and is reproduced in Appendix "C" to this Jurisdictional Statement. It is also reproduced in the Appendix to the Petition for Certiorari in *Taylor* v. *Lavine*.

The memorandum and order of the United States District Court for the Eastern District of New York in *Taylor* v. *Lavine* (WEINSTEIN, D.J.), dated October 10, 1973, is unreported and is reproduced in Appendix "D" to this Jurisdictional Statement. It is also reproduced in the Appendix to the Petition for Certiorari in *Taylor* v. *Lavine*.

Jurisdiction

The jurisdiction of this Court to consider the instant appeal is conferred by 28 U.S.C. § 1253.

The Judgment and Order appealed from was entered in the district court on August 15, 1974. The Notice of Appeal to this Court was filed in the district court on August 20, 1974. The Judgment and Order and the Notice of Appeal are reproduced respectively in Appendix "E" and Appendix "F" to this Jurisdictional Statement. The Judgment and Order and the Notice of Appeal are also reproduced in Appendix "B" and Appendix "C" to the Supplement to the Petition for Certiorari in *Taylor* v. *Lavine*.

The jurisdiction of the district courts was conferred by 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) and (4).

Regulations Involved

18 N.Y.C.R.R. § 352.30 states in part:

352.30 *Persons included in the budget*

• • •

(d) A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15 shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular allowance.

18 N.Y.C.R.R. § 352.31 formerly stated in part:

352.31 *Estimate of need and application of income*

(a) *For applicant or recipient.*

• • •

(3) When a female applicant or recipient is living with a man to whom she is not married, other than on an occasional or transient basis, his available income and resources shall be applied in accordance with the following:

• • •

(iv) When the man is unwilling to assume responsibility for the woman or her children, and there are

no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(d).[•]

Additional related statutes and regulations appear in Appendix "G" to this Jurisdictional Statement.

Questions Presented

1. Whether the pro-ration of shelter cost among all persons living in a household and the exclusion of the non-paying lodger's share of that cost from public assistance shelter allowance payments pursuant to 18 N.Y.C.R.R. § 352.30(d) establish any irrebuttable presumption in violation of the recipient's rights to due process of law?

2. Whether the distinction under § 352.30(d) between public assistance recipients who share their households with lodgers and those who do not violates the recipient's rights to equal protection of the laws?

3. Whether the district court erred in refusing to allow evidence of substantial contributions of household furnishing made to appellee Hurley by her lodger prior to the

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[•] Effective July 26, 1974, § 352.31 (a)(3)(iv) was amended to provide:

(3) When an applicant or recipient is living, other than on an occasional or transient basis, with a person to whom such applicant or recipient is not married, the available income and resources of such person shall be applied in accordance with the following:

• • •

(iv) When the person is unwilling to assume responsibility for the applicant or recipient or his or her children and there are no children for whom such person is legally responsible, such person shall be treated as a lodger in accordance with subdivision (d) of section 352.30 of this Part.

events giving rise to the action and in striking conforming allegations and documentation from appellees' answer?

4. Whether the district court erred in refusing to dismiss the claims of appellees Taylor and Otey on the ground of mootness notwithstanding the court's apparent recognition that neither appellee continued to have a justiciable grievance against the named public officials?

5. Whether the district court erred in defining the appellee class to include recipients who share households with paying and non-paying lodgers and in invalidating § 352.30(d) as to both categories of lodgers notwithstanding that appellees shared their households with non-paying lodgers and that no recipient could claim to be aggrieved by the paying lodger provisions of § 352.30(d)?

Statement of the Case

A. The New York Shelter Allowance Program

The categorical assistance programs administered by the New York State Department of Social Services and the local districts provide for the separate determination of shelter needs and for the payment of a shelter allowance as a distinct component of the total public assistance grant.* Social Services Law § 131-a subds. 1 and 2 (App.

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* At present, the State and local districts administer AFDC and Home Relief—Veterans Assistance. The cost of the AFDC program is shared by the federal government (50%), the State (25%) and the local districts (25%). The cost of the Home Relief-Veterans Assistance program is shared by the State (50%) and the local districts (50%). The two basic components of a grant issued under either program are a "pre-added" or "basic" grant for food, clothing and incidentals and a shelter allowance. Social Services Law § 131-a subd. 2; 18 N.Y.C.R.R. §§ 352.2-352.4.

"G" pp. 91a-92a);* 18 N.Y.C.R.R. §§ 352.1-352.4. The consideration of shelter as a separate item of need is accepted by HEW. Simplified Methods for Determining Needs, Method II, HEW 1964.** As of 1971, 49 of the 50 states provided separate shelter allowances for public assistance programs. *Boucher* v. *Minter,* 349 F. Supp. 1240, 1242 n. 2 [D. Mass. 1972 (3 judge court)].

Shelter allowances for the payment of rent are provided pursuant to 18 N.Y.C.R.R. § 352.3(a) (App. "G", pp. 93a-94a).*** Under the terms of the regulations, each of the 58 local districts must file a schedule setting forth monthly maximum allowances, by number of rooms, which are sufficient "to permit all persons to obtain housing in accordance with standards of public health in the community." The local district then pays the recipient's actual cost of rent up to the scheduled maximum. 18 N.Y.C.R.R. § 352.3(a).**** In practice, the local districts have used both the number of rooms and family size to

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* References preceded by App. and a letter refer to the Appendices to this Jurisdictional Statement.

** Simplified Methods for Determining Needs is defendants' Exhibit C in evidence before the three-judge district court. Prior to the expiration of appellees' time to move with respect to this Jurisdictional Statement, appellants will request the Clerk of the United States District Court for the Southern District of New York to certify and transmit the record of the proceedings below pursuant to Rule 12 of the Rules of the Supreme Court of the United States.

*** Shelter allowances are also available for recipient owned property (Social Services Law § 131-a subd. 1; 18 N.Y.C.R.R. § 352.4) and for temporary housing in hotels and motels (18 N.Y.C.R.R. § 352.3 [f]).

**** A new subdivision § 352.3(a) setting forth a state-wide shelter allowance schedule by county and public assistance family size has been published in Title 18 of the New York Code Rules and Regulations. The effective date of the new schedule is projected as January 1, 1975. However, the schedule has been filed by 14 counties as their schedules under § 352.3(a) as presently in effect. The new local schedules do not affect the principle of pro-ration as expressed in § 352.30(d).

determine appropriate shelter allowances and have often exceeded the scheduled maximums. The effect of allowing local exceptions to the maximums has been that the vast majority of recipients receive shelter allowances equal to their rent.*

Both in fact and in law, shelter is the common and shared need of all the members of a given household. Thus an AFDC eligible caretaker and child living alone in effect receive two shelter payments, one for the caretaker relative and one for the child, reflecting the fact the shelter need of each is a share of the housing unit in which they reside and that the entitlement of each is a pro-rated portion of the allowed rent. *Boucher* v. *Minter*, 349 F. Supp. *supra* at 1244. 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv)** simply provide method for determining and compensating the shelter needs of public assistance recipients when they choose to expand their households by adding an additional person (or persons) who is neither an applicant nor recipient of public assistance and

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* The affidavit and testimony of Linda Harmon, a Senior Program Analyst for the N.Y.D.S.S., received by the three-judge district court puts the figure at approximately 93% of the statewide caseload. The remaining 7% consists largely of employed recipients who benefit from certain income exemptions and therefore have extra money available for rent.

** Section 352.30(d) is the operational regulation at issue in both actions. Section 352.31(a)(3)(iv), both in the form considered by the courts below and as amended, merely describes circumstances where the application of § 352.30(d) is appropriate. It was therefore properly regarded as superfluous in the prior proceedings. The single exception is Judge Oakes dissenting opinion in the Second Circuit wherein he suggests that on remand the three-judge district court find § 352.31(a)(3)(iv) a "violation of equal protection on the basis of sex" (App. "B" p. 42a). The suggestion was rejected by Judge Weinstein, writing for the district court majority (App. "A" p. 18a). However, any need to consider the alleged sex discrimination issue was removed by the recent amendment to § 352.31(a)(3)(iv) which deletes the terms "female" and "man" and substitutes "person". See pp. 4-5, *ante*.

who is therefore not entitled to have his (or her or their) shelter need met from public funds.* The procedure has been approvd in principle by HEW (Simplified Methods For Determining Needs, Methods II and III) and with specific reference to these actions.**

18 N.Y.C.R.R. § 352.30(d) defines a lodger as a "non-legally responsible relative" or "unrelated person" living in a household formerly occupied exclusively by one or more recipients. He may be a paying or a non-paying ("non-contributing") lodger.*** With respect to the former, § 352.30(d) provides that amount paid in excess $15 each month (or $60 for boarding lodgers) shall be treated as income to the recipient. With respect to the latter and only portion of the regulation placed issue below by appellees, the shelter allowance, or rent in the vast majority of cases, is pro-rated among the number of people living in the household and an amount equal to the lodger's fractional share excluded from the shelter allowance. The object of the pro-ration procedure is to determine the lodger's shelter need in terms of the number of persons with whom shelter is in fact shared; to separate the lodger's shelter need from that of the recipient (or recipients); and to

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* For convenience, the lodger and recipient are hereinafter referred to in the masculine singular unless otherwise appears from the text.

** Letter from Elmer Smith, Regional Commissioner for Region II, HEW on David Kellogg, Senior attorney, NYDSS, dated November 15, 1974, Exhibit "D" to appellant's application for a Stay Pending Disposition of this appeal filed in this Court on or about Sept. 12, 1974 (Application No. 161). The letter states in part: "HEW has permitted states to prorate shelter allowances to reflect the percentage of public assistance recipients in a household. Such proration is not considered an assumption of income, but rather a recognition that per-individual costs decrease as the number of individuals living together increases".

*** The additional distinction in § 352.30(d) between boarding lodgers and non-boarding lodgers has not effect on the pro-ration of the shelter allowance.

preclude the payment of the lodger's share of rent from public assistance funds.

The factual determinations made in support of pro-ration are as follows: 1) a "non-legally responsible relative" or "unrelated person" is living in the household; 2) his failure to demonstrate eligibility for public assistance; 3) his failure to pay his fractional share of the rent; 4) the size of the public assistance family; and 5) the amount of the shelter allowance. These determinations are made initially by the local social services agency after investigation. They are then subject to review at a state "fair hearing" at the instance of the recipient. 18 N.Y.C.R.R. Part 358.

In the event that a non-recipient chooses to expand his household by inviting one or more public assistance recipients to share his living quarters, the New York shelter allowance program again distinguishes the shelter need of the non-recipient from that of the recipient and pays a shelter allowance to the recipient in proportion to his share of the rent for the combined household. 18 N.Y.C.R.R. § 352.3(c) (App. "G" p. 94a).*

* The only difference between § 352.3(c) and 352.30(d) is that under the former, the actual rent is pro-rated and the recipient obtains his share up to the appropriate maximum whereas under the latter, the shelter allowance is pro-rated. However, since the shelter allowance largely equals rent, the recipient receives his fair proportion of the actual cost of shelter regardless of whether § 352.3(c) or § 352.30(d) is applied. Section 352.3(c) was recently invalidated as inconsistent with 45 C.F.R. § 233.90(a) in *Battle* v. *Lavine*, —— A D 2d —— (2d Dept. 1974), rev'g. a State Supreme Court decision (Index No. 7385/73). The opinions are reproduced in Appendix "I". Principle reliance was placed on District Judge Bauman's opinion in *Hurley* v. *Van Lare* (App. "C") which was subsequently reversed by the Second Circuit (App. "B"). However, review of the *Battle* opinions suggests that § 352.3(c) was not properly in issue since petitioner there complained about the termination of her shelter allowance not its pro-ration, and the question of whether she was sharing shelter with anyone except her

(footnote continued on following page)

The purpose of the non-paying lodger portions of § 352.3(d) is apparent. Since he has not demonstrated his eligibility for public assistance, the non-paying lodger is not entitled to have his need for shelter (or any other allowed item of need) considered in computing a public assistance budget or paid from public assistance funds. Further, since he must either have the capacity to pay his share of the rent or be incapable of doing so, § 352.30(d) both prevents the financially capable lodger from diverting public funds from those who are truly "needy" and requires that the alleged "poor" lodger be examined under the same standards of eligibility and held to the same obligations of repayment as all other applicants and recipients.

To the extent the paying lodger portions of § 352.30(d) provide for income disregards of $15 and $60 (boarding lodgers) monthly, they reflect a state policy which is intended to encourage recipients to take in paying rather than non-paying lodgers.*

B. The Facts

Appellee Hurley

Appellee Hurley receives public assistance for herself and her three children, Doreen, Jamie and John under the AFDC categorical assistance program. Their benefits include a separate shelter allowance pursuant to 18 N.Y.C.R.R. § 352.3(a).

During the approximate period from December 8, 1969 to March 5, 1971, Mrs. Hurley and her children resided

(footnote continued from preceding page)

concededly eligible child was apparently not resolved. See concurring opinion of App. "I" p. 9. The *Battle* case is now on appeal to the New York Court of Appeals where appellants anticipate that the material issues will be clarified or the case remanded for a new "fair hearing".

* Affidavit and testimony of Linda Harmon before the three-judge court.

in an apartment in Mount Vernon, New York in Westchester County. The apartment consisted of at least a living room, kitchen with dining area, three bedrooms and bath. The actual rent was $150.00 per month. The maximum applicable shelter allowance under the Westchester schedule was $182.00.* With the exception of a four-month period giving rise to the claims herein, Mrs. Hurley and her children received a shelter allowance of $150.00 a month, or the equivalent of the actual rent.

From November of 1970 through February of 1971, ADR, a male friend, resided with Mrs. Hurley and her chilldren. Although it is undisputed that ADR was employed during this four-month period, he did not pay any portion of the rent and did not make any contributions to the Hurleys. However, between November 28, 1967, when the Hurleys received a special grant in the amount of $718.50 for furniture, and September 15, 1970, appellants alleged before the three-judge court that ADR gave the Hurleys numerous gifts.**

Upon verifying to its satisfaction that ADR was residing with the Hurleys and had not paid any portion of the rent, the local agency advised appellee that the total assistance benefits payable to her family would be reduced by $35 monthly for the period of ADR's residence. The local agency's determination was modified at a state "fair hearing" so as to reduce the shelter allowance by $30

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* All county schedules were received in evidence by the three-judge court. The Westchester and Nassau schedules were also submitted to the Second Circuit.

** The gifts are alleged in appellants' Answer and in a caseworker's report of a "home visit" made on September 15, 1970. The pertinent paragraphs of the Answer and case record are reproduced in Appendix "H". Testimony about the September 15, 1970 "home visit" was offered at the evidentiary hearing before the three-judge court and refused. The pertinent paragraphs of the Answer and the caseworker's report were subject to a motion to strike determined in appellees' favor. Both rulings are raised on this appeal.

monthly (⅓ the regular shelter allowance or ⅓ of the rent) referrable to the period from November 1970 through February 1971.

The Hurleys presently reside in upstate New York where they have been continued on the AFDC program. Although Mrs. Hurley no longer has a lodger, she advised the district court that she wished to have a certain male friend (not ADR) reside with her and would do so but for the proration provisions § 352.30(d). Appellants accept her allegations in this regard as true.

Appellee Taylor

Appellee Taylor receives public assistance for herself and her minor child, Margaret, on the AFDC categorical assistance program. Their benefits include a separate shelter allowance.

Appellee and her child share an apartment with appellee's sister, Virginia Taylor, in Freeport, New York, in Nassau County. Their apartment consists of a living room, kitchen, one bedroom, and bath. The actual rent for the apartment (through May 31, 1974) was $180 for a month. The maximum local shelter allowance for an apartment of 3-4 rooms accommodating three people is $165 monthly.

Prior to January 1973, appellee's sister Virginia Taylor was a recipient of public assistance on the Home Relief program. The rent was apportioned between the monthly shelter allowance payable to appellee Taylor and her child and the monthly shelter allowance payable to Virginia Taylor up to the local maximum as follows: ⅔ of $165, or $110 for appellee and her child and ⅓ of $165, or $55 for Virginia Taylor.

In January 1973, Virginia Taylor's Home Relief was discontinued because of a determination of ineligibility by the local agency. This determination was not appealed in a state "fair hearing" and was not challenged below.

During the ensuing two-month period, appellee Taylor continued to receive a shelter allowance equal to ⅔ of the local maximum because Virginia Taylor was a non-paying lodger within the meaning of § 352.30(d) during the relevant period.

Effective March 14, 1973, Virginia Taylor was restored to public assistance on the Aid to the Disabled program. On or about January 1, 1974, her case was transferred to the federal SSI program. Under both programs, Virginia Taylor has received a shelter allowance or its equivalent. Appellee Taylor does not allege that her sister has failed to pay her pro-rata portion of the rent at any time following her restoration to public assistance or that her sister is in any jeopardy with respect to her continuation on the federal SSI program.

Appellee Otey

Appellee Otey receives public assistance for herself and her minor child Kevin under the AFDC categorical Assistance program. Their benefits included a separate shelter allowance.

At all times relevant herein, appellee Otey resided with Kevin in Freeport, New York, in Nassau County. The apartment has a living room, kitchen, two bedrooms and bath. The rent is $145 monthly. The local maximum for an apartment of 2-4 rooms accommodating 2 people is $145.00.

On or about October 1, 1972, Michael Otey, appellee's adult son, age 24, came to reside with appellee and Kevin. Michael remained there until approximately February 1, 1974 when he went on public assistance and left to reside independently. During his residence with appellee, Michael Otey held occasional jobs. However, he did not pay any portion of the rent or make any contributions to appellee or Kevin.

On or about October 26, 1972, appellee Otey was advised by the local public agency that the shelter allowance she and Kevin had been receiving would be reduced by ⅓ pursuant to § 352.30(d) to reflect Michael's living in the household. This reduction became effective February 1, 1973 upon appellee's failure to appear at a state "fair hearing" she had requested. The shelter allowance was restored to $145.00 monthly when Michael demonstrated his separate eligibility for public assistance and left to reside independently.

Applicants for Intervention

Phyllis D'Alessio, Loretta Clark and Francesca Aloise applied for intervention during the course of the proceedings below on behalf of themselves and their minor children. The facts alleged in support of their applications closely paralleled those alleged by the named plaintiffs, appellees herein. See opinion of the single district judge in *Hurley* v. *Lavine,* App. "C" pp. 66a-68a. However, applicant for intervention Phyllis D'Alessio, testified on behalf of appellees at the evidentiary hearing before the three-judge district court and the facts in support of her claims are treated at some length in the three-judge court opinions. Accordingly, they are briefly reviewed below:

Phyllis D'Alessio

Mrs. D'Alessio is a recipient of public assistance on the AFDC program on behalf of herself and her two minor children, Cathy Lenore and Marie.

The D'Alessios reside in an apartment in Mount Vernon, New York in Westchester County. The apartment consists of the following rooms with the approximate dimensions indicated: living room (12′ x 14′); master bedroom (12′ x 15′); girls' bedroom (10′ x 8′); kitchen (10′ x 13′); bath and an additional room (5′ x 6′) in which Mrs. D'Alessio keeps a refrigerator. The rent is $175 per month and the D'Alessios receive a shelter allowance in that amount.

On or before January 1, 1973, H.M., a male friend, came to live with the D'Alessios. H.M. has had occasional employment and has also received unemployment compensation. However, he has not paid any portion of the rent or made any contributions to the D'Alessios since January 1, 1973.•

Mrs. D'Alessio contends that both H.M. and she have been ill from time to time and that they assist each other with the children and household chores.

After verifying that H.M. was living with the D'Alessios and his failure to pay any portion of the rent, the local social services agency advised Mrs. D'Alessio in January, 1973 that the public assistance shelter allowance would be reduced by ¼ ($43.60) from March 1, 1973 forward to reflect H.M.'s pro-rata share. No state "fair hearing" was requested.

During the course of the evidentiary hearing before the three-judge court on June 26, 1974, Mrs. D'Alessio was asked why she had not asked H.M. to contribute his share of the rent. She answered:

> This man [H.M.] has just come out of the Veteran's Hospital after three weeks of hospitalization, and he is not fit for work right now due to extreme high blood pressure, hypertension, and his only way of work is a golf course, and he is not going to go out on the golf course and have a stroke so that he can pay $43 a month rent. [•]

Mrs. D'Alessio offered no other explanation at the hearing for her failure to request H.M. to pay his portion of the

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• H.M. gave Mrs. D'Alessio a bedroom set and a china cabinet in 1970 and apparently has resided with the family for intermittent periods since 1966.

[•] The transcript of the proceedings of June 26, 1974 will be transmitted to this Court with record.

rent from January 1, 1973 (the date the local agency claims H.M. started to reside permanently with the D'Alessio's) or October 4, 1973 (the approximate date Mrs. D'Alessio conceded at the hearing that H.M. came to reside with her on a permanent basis) and June 5, 1974 (three weeks prior to the hearing date and thus prior to the period of H.M.'s hospitalization as stated by Mrs. D'Alessio).• Mrs. D'Alessio testified further that H.M. was fully aware of the availability of public assistance but had refused to apply on his behalf.••

The shelter allowances of the named appellees and the applicants for intervention (except Frances Aloise) have been continued without pro-ration *pendente lite* pursuant to the undertaking of appellants' attorney before the single district judge in *Hurley* v. *Van Lare* (App. "C" pp. 66a-68a).•••

• In an affidavit received by the single district judge in *Hurley* v. *Van Lare*, sworn to February 6, 1973, Mrs. D'Alessio claimed that H.M. was then unable to work because of "prostate infection", "penolitis cyst" and "stomach problems". She stated further that H.M.'s occasional employment had included "various jobs, such as a truck driver's helper, locker room attendant and golf caddy".

•• Loretta Clark and Francesa Aloise are the two other applicants for intervention. Mrs. Clark lives in Buffalo, New York and is a recipient of AFDC on behalf of herself and her five minor children. Mrs. Clark's non-paying lodger is a male friend who has lived with the Clarks since at least December 6, 1972. Mrs. Aloise lives in New York City and receives AFDC for herself and her minor child Mario. Mrs. Aloise's non-paying lodger is her adult son Carmine. Carmine has lived with his mother since her least November 12, 1973. He has been continuously employed but has refused to pay any portion of the rent.

••• The undertaking remains applicable only to Mrs. D'Alessio and Mrs. Clark since they are the only original claimants who still have non-paying lodgers residing with them. Mrs. Aloise's application to intervene was not made until the hearing before the three-judge court on June 26, 1971. Appellants made no undertaking with respect to the continuation of the shelter allowance there in issue without pro-ration.

C. Proceedings Prior to Remand

Hurley v. *Van Lare* and *Taylor* v. *Lavine* were commenced as separate civil rights actions for injunctive and declaratory relief and damages in the form of retroactive public assistance benefits. Jurisdiction was alleged under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) and (4).

Hurley was commenced in the United States District Court for the Southern District of New York on or about August 11, 1972 and assigned to the Hon. Arnold Bauman.* An amended complaint was filed on or about September 1, 1972. *Taylor* was commenced in the Eastern District on or about May 16, 1973 and assigned to the Hon. Jack B. Weinstein.

Both cases challenged 18 N.Y.C.R.R. § 352.30(d) as inconsistent with the Social Security Act and unconstitutional.** In support of their claims under Social Security Act, appellees argued that the pro-ration of shelter allowances upon a finding that a non-paying lodger was living in the household established a conclusive presumption of contribution by the lodger to the public assistance family in violation of 42 U.S.C. § 602(a)(10) (App. "G" p. 88a) and 45 C.F.R. § 233.90(a) (App. "G" pp. 89a-90a). In support of their constitutional claims, appellees argued that the conclusive presumption of contribution previously asserted in support of the Social Security Act claims violated the recipients' rights to due process of law; that the classification established by the regulation between recipients who live with non-paying lodgers and those who live without lodgers violated the former recipients' rights to equal protection of the laws; and that any reduction in recipi-

* District Judge Bauman resigned from the bench since the conclusion of the proceedings below.

** The Taylor action did not raise any claims against § 352.31(a)(3)(iv). As noted at p. *ante*, this section has been treated as largely superfluous throughout, and the basis for any discrimination claim has been removed by recent amendment.

ents' shelter allowances which followed from findings that lodgers are living in their households violated the recipients' rights to privacy and free association.

The *Hurley* action was heard first by District Judge Bauman on appellees' motions for summary judgment in their favor on both the Social Security Act ("pendent") claims and the constitutional claims and on appellants' motion to dismiss the complaint for want of substantiality of the constitutional claims and in the alternative for summary judgment in their favor on the pendent claims. Judge Bauman determined that appellee's due process claim was substantial enough to vest the court with subject matter jurisdiction and then proceeded to the disposition of the pendent claims in preference to recommending the commencing of a three-judge court. *Hagans* v. *Wyman*, —— U.S. ——, 42 U.S.L.W. 4381 (March 25, 1974); *Rosado* v. *Wyman*, 397 U.S. 397, 403 (1970). Judge Bauman agreed with appellees, reading § 352.30(d) and § 352.32(a)(3)(iv) as man-in-the-house rules which "conclusively presume that the lodger is contributing to the [public assistance] family's income" (App. "G" p. 63a) and rejecting appellants' argument that the "regulations merely pro rate the rent among eligible persons and compute the shelter allowance accordingly, leaving the lodger non-eligible to pay his own way." App. "C" p. 64a. Judge Bauman also granted class action status (App. "C" pp. 55a-58a),* refused damages in the

* Judge Bauman originally defined the class as "all residents of the State of New York who are or were receiving public assistance, who have had their grants reduced, terminated, suspended or denied, or who are threatened with reduction, termination, suspension or denial, solely because of the enforcement of 18 N.Y.C.R.R. § 352.31(a)(3)(iv) and § 352.30(d)." App. "C" p. 56. However, on or about December 18, 1973, Judge Bauman signed an Amended Judgment and Order at the request of appellants and with the consent of appellees which defined the class as follows: "All residents of the State of New York who are or were or will be receiving public assistance, and who have had their grants of public assistance reduced, terminated, suspended or denied, or who

(footnote continued on following page)

form of retroactive public assistance payments (App. "C" pp. 68a-71a), and refused the applications for intervention by Mrs. D'Alessio and Mrs. Clark (App. "C" pp. 66a-68a).

Several days after Judge Bauman's opinion in *Hurley,* Judge Weinstein issued his memorandum and order in *Taylor* adopting Judge Bauman's reasoning in relevant part (App. "D").*

On appeal to the Second Circuit, the actions were consolidated, and the decisions of Judge Bauman and Judge Weinstein on the pendent claims reversed. *Taylor* v. *Lavine,* (HAYS, C.J. with FRIENDLY, C.J. for the majority, App. "B" pp. 26a-38a, and OAKES, C.J. dissenting, App. "B" pp. 39a-53a).

Writing for the Second Circuit majority, Circuit Judge Hays recognized both the economies of scale which occur when the number of persons in a given household expands while the rent remains constant and the appropriateness of separating the needs of the public assistance family from those of the non-recipient lodger. He stated in part (App. "B" pp. 36a, 37a, 38a):

> Section 352.30(d) does not attribute a non-existent obligation of support to the lodger, nor does it deny the AFDC-recipient children or caretaker their share of the actual housing expenditures. Prorating housing costs between the recipient and non-recipient simply reflects the separability of the need of the AFDC eligible family members from the needs of the persons

(footenote continued from preceding page)

may be threatened with reduction, termination, suspension or denial of public assistance solely because of the presence of a non-contributing lodger in the home pursuant to 18 N.Y.C.R.R. §§ 352.31(a)(3)(iv) and 352.30(d).

* No class action was specifically defined in *Taylor,* and it appears that Judge Weinstein believed that the *Taylor* plaintiffs and those similarly situated were subsumed in the definition of the *Hurley* class. App. "D" p. 78a.

> who have not demonstrated their eligibility for public assistance.
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> Prorating housing expenses among recipients and non-recipients of public aid accounts for economies of scale that are realized when individuals live in groups; per individual housing costs decrease as the number of individuals living together increases. In the Hurley case, for example, Hurley, her three children and her lodger can live at a lower per capita housing cost than can Hurley and her children alone. Thus, the New York scheme does not attribute a false duty of support or a false source of income, but rather accounts for the actual cost of housing to an AFDC-recipient family.
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> The New York regulations have more limited objectives than those held invalid in *King* and *Lewis.* The objective of section 352.30(d) is to insure that all of the beneficiaries of the AFDC grant are entitled to enjoy it. Unlike the Alabama and California regulations, the New York regulations do not cut off all aid to families housing non-eligible persons in their households. They merely prevent non-eligible persons from benefitting from free living space. New York's interest in preventing non-eligible persons from sharing in AFDC benefits is coextensive with the federal interest in allocating AFDC appropriations only to eligible persons. Section 402(a)(10) of the Social Security Act, 42 U.S.C. § 602(a)(10) (1970), states that aid must be furnished "with reasonable promptness to all eligible individuals," language necessarily implying that aid should not be furnished to non-eligible individuals." [Footnotes omitted.]

In his dissent, Circuit Judge Oakes appears to consider both the entire residence and the entire shelter allowance the property of the dependent child and caretaker relative

regardless of how many additional persons in fact share that residence. He therefore concludes that the pro-ration of a shelter allowance under § 352.30(d) "withholds benefits from those rightfully entitled" rather than preventing public assistance subsidies of the shelter needs of the lodgers, App. "B" p. 47a. Although acknowledging that the State cannot and should not be required to extend AFDC benefits to ineligible persons, Judge Oakes does not address himself to the question of how such benefits can be avoided without separating recipients' shelter needs from those of non-recipient lodgers except to suggest that the State and local districts pay the entire allowed rent for the shelter and bring what appellants take to be monthly actions against the lodgers to recover their proportionate shares of the rent (App. "B", pp. 47a-50a).

As a result of the Second Circuit decision on the pendent claims, the actions were remanded to a three-judge district court to hear and determine the due process, equal protection and privacy claims raised by appellees. App. "B" p. 29a.

A Petition for Rehearing suggesting that the actions be heard *en banc* was denied by the Second Circuit on June 18, 1974. On or about August 2, 1974, a Petition for a Writ of Certiorari to review the Second Circuit decision was filed in this Court and is awaiting disposition. *Taylor* v. *Lavine* (Doc. No. 74-5054). A Supplement to the Petition was filed on or about August 25, 1974 describing the disposition on remand.

D. Proceedings Upon Remand

On June 26, 1974, the constitutional claims were heard by a three-judge court consisting of District Judges Bauman and Weinstein, the convening judges in *Hurley* and *Taylor* respectively, and Circuit Judge Hays, the author of the Second Circuit majority opinion in the pendent claims. Pursuant to Judge Weinstein's suggestion, an evidentiary hearing was held.

The majority of the district court (per WEINSTEIN, D.J.) sustained appellees' due process claims against 18 N.Y.C. R.R. § 352.30(d). App. "A" pp. 2a-20a. Circuit Judge Hays dissented in conformity with the views expressed in his earlier opinion. App. "A" pp. 20a-23a.

Although recognizing that § 352.30(d) both assists in determining a recipient's actual needs and allocates scarce public assistance funds where they are most necessary (App. "B" pp. 5a, 19a), the district court majority nonetheless found that two "irrebuttable presumptions" inhered in the regulation which offended due process because they were not "necessarily" or "universally true in fact", *Vlandis* v. *Kline*, 412 U.S. 441, 452, (1973). The presumptions alleged are first, that the public assistance family with a non-paying lodger needs less space for its own use than it has and thus its shelter requirements can be met by a smaller shelter allowance;* and, second that the public assistance family with a non-paying lodger "somehow needs less money to pay its share of the rent." App. "A" p. 5a. The majority then found that the due process violations could be cured by making the presumptions "rebuttable" at a state "fair hearing" offered to the recipient wherein individual circumstances could be considered. Among the factors suggested for consideration at such hearings are whether a reduction in the shelter allowance will adversely affect any dependent children, the lodger's social role in the household, the lodger's capacity and willingness to contribute towards the rent and whether the lodger's presence in fact diminishes the recipient's shelter needs. App. "A" pp. 5a-6a, 16a.

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* Notwithstanding Judge Weinstein's characterization of this "presumption" as one relied upon by the State (App. "A" p. 12a), the State never offered any theory in support of § 352.30(d) which purported to assess whether the public assistance families with lodgers had more space than families without lodgers or more space than they needed. See opinion of OAKES, C.J., App. "B" p. 44a. The theory apparently derives from a comment by Judge Hays in his Second Circuit opinion. App. "B" p. 37a.

The majority found it unnecessary to articulate a separate equal protection ground of decision at least as to the non-paying lodger portions of § 352.30(d). App. "A" p. 19a. However, the decision characterizes the $15 and $60 (boarding lodger) income disregards for recipients with paying lodgers as "anomalous" (App. "A" pp. 17a-18a), and the Judgment and Order of August 15, 1974, apparently referring to that portion of the opinion, defines the class to include recipients with paying as well as non-paying lodgers and provides for declaratory and injunctive relief against § 352.30(d) in its entirety. App. "E". Appellees' claims of violation of their rights of free association and privacy were rejected as was the speculative sex discrimination claim. App. "A" pp. 18a-19a.

In his dissent, Circuit Judge Hays notes that the majority's failure to afford controlling significance to the Second Circuit decision in *Taylor* v. *Lavine* effectively finds that the Court of Appeals has unconstitutionally applied § 406(a) of the Social Security Act, 42 U.S.C. § 606a, defining dependent children under the AFDC program. App. "A" p. 23a, n 1. See also 42 U.S.C. 602(a)(10) requiring that AFDC "be furnished with reasonable promptness to all eligible individuals" (App. "G" p. 88a) and necessarily only to such individuals.

Judge Hays then again rejects the application of an "irrebuttable presumption" theory (App. "A" pp. 20a, 21a, 22a):

> The challenged regulation . . . is not unconstitutional. It sets up no "irrebuttable presumption . . . not necessarily or universally true in fact." *Vlander* v. *Kline*, 412 U.S. 441, 452 (1973).
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> [The Second Circuit in *Taylor* v. *Lavine*] reasoned that prorating shelter costs between AFDC-eligible and non-eligible members of a household insures that

> AFDC funds are disbursed only to individuals who have demonstrated their need for assistance. It found that the New York regulation is reasonably justified by considerations such as the severability of individual needs, the divisibility of space, and the economies of scale that result from combining small living units into larger groups[.]
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> If the lodger is financially able to contribute to the cost of maintaining the household, New York surely does not offend due process by abating the shelter allowance of the AFDC recipient pro rata according to the lodger's share. If the lodger is not financially able to contribute his share, New York permits him to establish separate eligibility for public assistance . . . Should the lodger establish his eligibility, it is admitted by all parties that a household like the Mrs. D'Alessio-Mr. M household would receive a shelter allowance increased over the amount received by the D'Alessio household alone [*].
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> Any "presumption" of the lodger's means may be refuted at the lodger's initiative in the same forum in which the AFDC recipient was initially required to establish a need for aid. The "conclusive presumption" denounced by the majority is the same "presumption" that attaches to every member of our society; that he is able to pay his own way until and unless he demonstrates the contrary. If a lodger is eligible for public assistance but does not apply, his silence cannot

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[*] Under the New York shelter allowance program, shelter allowances increase in approximate proportion to the number of rooms needed to accommodate the recipients or in proportion to the number of recipients in a given household. Thus, if Mr. M. became an applicant or recipient, the D'Alessio-M. household would be able to obtain either a shelter allowance for an apartment with enough rooms to accommodate the D'Alessios and Mr. M. or a shelter allowance based on the number of applicants and recipients within the household.

be put at the state's door. If the lodger is too proud to accept welfare—Mrs. [D'Alessio's] testimony indicates that such was Mr. M's motive for not applying for aid—then he ought to be too proud to accept aid from the state indirectly through the eligible AFDC recipient. A non-contributing lodger like Mr. M has and eats his public assistance cake without demonstrating his need.

With respect to the majority's choice of a "fair hearing" offered to the recipient as vehicle for rebutting the "presumptions", Judge Hays commented in part (App. "A" p. 22a)

> The majority states that the aid recipient's "Fair Hearing" . . . is a "reasonable alternative means" for determining the amount a lodger is willing or able to pay toward the cost of housing. But this statement glosses over the obvious difficulty of determining the means or intent of a person who has not put his affairs before the Social Services Department by applying for public assistance. In none of the recent Supreme Court due process cases cited by the majority did the reasonable alternative means of fact-finding entail intrusion into the affairs of any person who did not apply for or seek a governmentally administered benefit or right.

Judge Hays concluded in part (App. "A" p. 23a):

> [Section 352.30(d)] does not necessarily upset the established patterns of cooperation between people of limited and uncertain means. So long as each member of a group cooperating as a household establishes his eligibility for public funds, cooperating will increase the shelter allowance due the whole. In any event, the procedure implicitly sanctioned by the majority, requiring the lodger to submit his affairs to the New York State Social Services Department in the context

> of the AFDC recipient's "Fair Hearing", is surely no less conducive to "familial disintegration" than requiring the lodger to demonstrate his need on his own application.
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> While assailing the rationality of section 352.30(d), today's majority embraces irrationality. It creates a unique class of persons who may receive the benefit of state aid without demonstrating any need for such aid.
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> It prefers lodgers in AFDC households over the eligible AFDC recipients themselves since the latter must bear the burden of demonstrating their eligibility. In our complex society there are no simple means of identifying households in need of state assistance, or of allocating the limited stock of resources among individuals who have demonstrated a need for such assistance. Section 352.30(d) is a valid attempt by New York to make such an allocation and it ought to be upheld.

On September 12, 1974, appellants filed an application in this Court for a stay of the Judgment and Order of the district court pending the disposition of this appeal (Application No. 161). The application to the three-judge court for a stay was denied on August 15, 1974.

It is anticipated that the Brief in Opposition to the Petition for Certiorari to review the Second Circuit opinion in *Taylor* v. *Lavine*, (Doc. No. 74-5054) will be filed with this Jurisdictional Statement.

Argument

The district court majority opinion, if upheld, requires the State of New York and its local social services districts to provide rental subsidies for non-paying lodgers without any showing that those lodgers are in fact eligible for pub-

lic assistance. The cost of the program is estimated in excess of $2,000,000 annually (appellants' stay application, filed September 12, 1974, pp. 20-21). Funding could only be obtained through new appropriations or by reducing the standard of assistance now available to recipients of demonstrated need.

In contrast, the statewide plan invalidated by the majority fairly apportioned the cost of shelter among all individuals living in a common household and assured that the shelter needs of public assistance recipients living there would be met from public assistance funds while excluding those of non-paying, non-recipient lodgers. This plan was sustained by a majority of the Second Circuit.

The position of the district court majority follows from the erroneous application of the doctrine of irrebuttable presumptions and the concomitant requirement of a finding of "no alternative means" with respect to a classifying regulation properly considered under a traditional equal protection test. The majority's reasoning in this regard reflects a serious misapprehension of the relevant decisions of this Court and should be corrected to conform with the Second Circuit decision in *Taylor* v. *Lavine* (Doc. No. 74-5054).

A. The pro-ration of shelter cost among all persons living in a common household and the exclusion of the non-paying lodger's share from shelter allowance payments pursuant to 18 N.Y.C.R.R. § 352.30(d) do not raise any irrebuttable presumption in violation of the recipient's rights to due process of law.

None of the opinions below disputes the power of the Commissioner of the New York State Department of Social Services to promulgate general rules excluding non-recipients from shelter allowance payments. Section 352.30 (d) performs exactly this function when recipients and non-recipients, herein non-paying lodgers, live in common households. As the Second Circuit held, the regulation is

completely consistent with the statutes and regulations governing the AFDC program which require that public assistance be paid to meet the needs of dependent children and, if necessary, those of the caretaker relatives with whom they reside. 42 U.S.C. §§ 601, 606(a), (b) (App. "G" pp. 87a-89a). The obligation of the State and local agencies to furnish aid to "all eligible individuals," 42 U.S.C. § 602(a)(10) (App. "G" p. 88a) necessarily means that payments must be made to those individuals who have demonstrated eligibility in conformity with the state plan and only to them, i.e. to the caretaker relative and dependant a child and not to the caretaker, child and "lodger".* Social Services Law §§ 131, 131-a, subds. 1 and 2, 343, 344, 349, 350 (App. "G" pp. 90a-93a); Second Circuit majority opinion, App. "B" p. 38a.

Considering the non-paying lodger provisions of § 352.30 (d) in a due process rather than a statutory context does not change the purpose or effect of the regulation and cannot, appellants submit, produce a different legal result.

This Court's recent decisions invalidating legislation that established "permanent" or long term classifications on the basis of unwarranted factual inferences or "irrebuttably presumed" facts are not authority to the contrary. *Cleveland Board of Education* v. *La Fleur,* 414 U.S. 632 (1974) (physical incapacity to teach irrebuttably presumed from fact of pregnancy); *Vlandis* v. *Kline,* 412 U.S. 441

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* Federal AFDC legislation authorizes the states to provide public assistance to certain persons other than dependent children and caretaker relatives who are considered essential to welfare of the recipients. 42 U.S.C. §§ 602(a)(7), 606(b) (App. "G" pp. 87a-88a, 88a-89a). New York has opted to participate in this extension of the AFDC program. Social Services Law § 350; 18 N.Y.C.R.R. § 352.7(f). No claim was made below that any of the "lodgers" were essential persons within the meaning of the federal and state legislation. Moreover, an essential person must establish separate eligibility for public assistance on the basis of his own income and resources. 18 N.Y.C.R.R. § 352.7(f).

(1973) (non-residency during state university enrollment irrebuttably presumed for married students whose legal address was outside state at the time of application for admission and for single students whose legal address was outside the state at some point during the year preceding admission); *United States Department of Agriculture* v. *Murry*, 413 U.S. 508 (1973) (lack of need for food stamps irrebuttably presumed from family's tax exemption taken in preceding year); *Stanley* v. *Illinois*, 405 U.S. 645 (1972) (unfitness for custody of natural child irrebuttably presumed from status as unwed father). See district court majority opinion, App. "A" pp. 11a-12a.

Since the non-paying lodger may change his status to paying lodger or to recipient if he demonstrates his need, § 352.30(d) cannot be read as assigning "permanent" or long term status. Further, § 352.30(d) does not rely on any inferred, "presumed" or unproven facts. All that is necessary or appropriate to support the operation of the regulation are findings that a "non-responsible relative" or "unrelated person" is living with one or more recipients; that the "relative" or "person" has failed to demonstrate his eligibility for public assistance; and that he has failed to pay his fractional share of the rent.* Once these findings are made, the lodger is established as a non-recipient and his shelter needs can be properly excluded from the public assistance budget. If the circumstances are illustrated in terms of an alleged "presumption," the "basic" or proven facts of the lodger's residence and non-eligibility are the same as the inferred or "presumed" facts necessary to support the operation of the regulation. As is apparent, the illustration leaves

* In order to give full effect to the pro-ration provisions, it is, of course, necessary to determine the total number of persons living in the household, the number of public assistance recipients, and the amount of the shelter allowance. See p. 10, *ante*. All of the findings are based on investigation by the local agency and are subject to review at a state "fair hearing."

open only one viable conclusion, that § 352.30(d) establishes no "presumption" at all with respect to non-paying lodgers, much less an "irrebuttable" one.

The majority's reliance on "presumptions" follows from its refusal to distinguish, or separate, the shelter needs of the lodger from those of the public assistance family. Thus, Judge Weinstein erroneously defines the shelter needs of the public assistance family in terms of the allowed rent for an entire apartment regardless of how many additional persons or "lodgers" also live there and finds, as a concomitant, that any reduction in the shelter allowance "presumes" that the lodger is contributing to the shelter needs of the recipient family. District court majority opinion, App. "A" pp. 15a-17a. However, correctly viewed, shelter is the shared need of all persons living in a common household, recipient and lodger alike, and each person's share is properly expressed as a fraction of the actual or allowed rent. The shares equal to the number of persons in the public assistance family can then be separated and paid from public funds and the lodger's share excluded.* In this manner the actual needs of the public assistance family are determined on the basis of actual changes in living arrangements occasioned by the arrival of the lodger. The fact that the shelter allowance is "reduced" merely reflects the fact the public assistance family's shelter needs had been budgeted prior to the lodger's arrival and therefore without regard to his share. Had the lodger joined the family prior to their application for assistance, the family's shelter needs would have been budgeted initially in proportion to

* Pro-ration and separability may be illustrated in operational terms as follows. While Mrs. D'Alessio and her two daughters occupied the entire two bedroom apartment, their shelter needs were equivalent to the 3/3 of the rent. When Mr. M. moved in, adding another share, the D'Alessios' shelter needs became the equivalent of 3/4 of the rent, and Mr. M.'s shelter needs became the equivalent of 1/4 of the rent. Pursuant to § 352.30(d), the D'Alessios' shelter needs were then separated from Mr. M.'s shelter needs and only the D'Alessios' needs met with public assistance funds.

their numbers in the household, and no reduction would have taken place. For example, appellee Taylor and her minor child received a shelter allowance of ⅔ of the allowed rent both before and after the application of § 352.30(d) because appellee's sister Virginia Taylor shared the apartment during the entire period.

The separability of the shelter needs of the recipients from those of the non-recipient is well established. 42 U.S.C. § 606(c) (describing the situation where the recipient caretaker relative and dependent child live with other relatives and evidently contemplating aid only to the caretaker and child) (App. "G" p. 89a); Simplified Methods For Determining Needs, Method III; Social Services Law §§ 131, 131-a, 343 (providing for assistance to recipients of demonstrated need regardless of whether they live alone, with other recipients, or with non-recipients) (App "G" pp. 90a-92a); *Gilliard* v. *Craig,* 331 F. Supp. 587 (W.D.N.C.), *aff'd.* 409 U.S. 807 (1972) (allowing exclusion of ineligible child's needs from budget of public assistance family with whom he lived); *Boucher* v. *Minter,* 349 F. Supp. *supra* at 1244 (noting that needs of mother who became ineligible after remarriage because of her husband's legal obligation to support her were separable from needs of stepchildren who continued to be eligible in the absence of a general legal obligation requiring stepfathers to support stepchildren); *Dullea* v. *Ott,* 316 F. Supp. 1273 (D. Mass. 1970) (sustaining automatic budgeting reclassification to category in which recipients shared living arrangements with non-recipients and only the recipients' shares were reimbursed); Second Circuit majority opinion, App "B" p. 36a; district court dissenting opinion, App "A", p. 21a.

To refuse to accept the separability of the shelter needs of the public assistance family from those of the lodger provides the lodger with a public subsidy in the form of free shelter. At no point in its opinion does the district court majority explain how the State and local agencies

can be required to pay this subsidy in face of the lodger's conceded failure to demonstrate his eligibility for public assistance. Moreover, the acceptance of the majority's theory makes the grant of a shelter allowance turn on a determination of whether the residence "belongs to" the public assistance family who has chosen to invite a non-recipient lodger to live with them or "belongs to" a non-recipient who has invited a public assistance family to live with him. In the former instance, the public assistance family would receive a shelter allowance for the entire residence since their shelter needs allegedly do not change because of the addition of the lodger and cannot be separated from those of the lodger. In the latter, the public assistance family would receive no shelter allowance since the non-recipient's shelter needs would not change because of the addition of the family and could not be separated from those of the family. Under the program invalidated by the court, the recipients obtain their share of shelter cost regardless of whether they choose to live with a non-recipient or a non-recipient lives with them. 18 N.Y.C.R.R. §§ 352.3(c) and 352.30(d).

Even if the non-paying lodger portions of § 352.30(d) are considered as raising certain presumptions, the regulation is nonetheless valid. The distinction between recipients and non-recipient lodgers rests on the "necessarily" and "universally true" fact that the recipients have demonstrated their eligibility for public assistance whereas the non-recipient lodgers have not. *Cleveland Board of Education* v. *LaFluer,* 414 U.S. *supra* at 644 quoting *Vlandis* v. *Kline,* 412 U.S. *supra* at 452. Moreover, any presumption that the lodger is self-sustaining or "paying his own way" is the same presumption that attaches to all members of society who are not participants in the public assistance program and is "rebuttable" by the simple act of applying to the local social services agency for aid. District court dissenting opinion, App. "A" p. 22a.

This Court's decisions in *King* v. *Smith,* 392 U.S. 309 (1970) and *Lewis* v. *Martin,* 397 U.S. 552 (1970) and the summary affirmances in *Gaither* v. *Sterret,* 346 F. Supp. 1095 [N.D. Ind.] *aff'd* 409 U.S. 1070 (1972), *X* v. *McCorkle,* 333 F. Supp. 1109 (N.D. N.J. 1970) *aff'd per curiam sub nom. Engelman* v. *Amos,* 404 U.S. 73 (1971) and *Solmon* v. *Shapiro,* 300 F. Supp. 403 (D. Conn.), aff'd 396 U.S. 5 (1969) are entirely consistent with appellants' position in the cases at bar.

In each of the foregoing cases, the needs of a concededly eligible family were either completely or partially excluded from consideration for public assistance by reason of a non-recipient in the household. In reaching this result, the statutes and regulations deemed the non-recipient to be responsible for the public assistance family's support when in fact he was not. Section 352.30(d) makes no such artificial assumptions about the non-paying lodger. It does not charge the lodger with the cost of the family's support but rather, in distinguishing between the lodger's needs and the family's needs, avoids charging the family and public funds with the non-recipient lodger's support.

B. 18 N.Y.C.R.R. § 352.30(d) does not violate recipients' rights to equal protection of the laws in distinguishing between recipients who live without lodgers and those who live with either non-paying lodgers or paying lodgers.

Appellees' equal protection claim throughout the proceedings below was limited to the alleged irrationality between pro-rating the shelter allowances of recipients who live with non-paying lodgers while leaving the shelter allowances of recipients who live without lodgers unaffected. District court majority opinion, App. "A" p. 19a. However, the district court majority did consider the rationality of the paying lodger and related income disregard

portions of § 352.30(d) as well.* District court majority opinion, App. "A" p. 17a-18a. Accordingly appellants consider both the non-paying and paying lodger classifications established by § 352.30(d) and submit that both are valid under the Equal Protection Clause.

It is beyond cavil that the traditional equal protection test of "reasonable relation to a legitimate state interest" is appropriate to both the non-paying and paying lodger portions of § 352.30(d). *Jefferson* v. *Hackney,* 406 U.S. 535 (1972); *Dandridge* v. *Williams,* 397 U.S. 471 (1970). See also *Kahn* v. *Shevin,* —— U.S. ——, 42 U.S.L.W. 4591, 4593 (April 24, 1974) (approving the application of the "reasonable relation" test to classifications which "discriminate" in favor of a particular groups as do the income disregards herein).

In support of the non-paying lodger portions of § 352.30(d), appellants contended that the State had a legitimate interest in refusing to meet the shelter needs of the non-paying lodger who has not demonstrated his eligibility for public assistance. See pp. 10-11, *ante.* The district court majority accepted appellants' position on this point. "The purported objective of this distinction [between recipients without lodgers and recipients with non-paying lodgers] is a constitutionally appropriate one since . . . New York may seek to allocate its scarce welfare resources where they are most needed." App. "A" p. 19a.

The related question of whether a uniform rule of general application like § 352.30(d) is a reasonable means of achieving this legitimate objective must also be answered in the affirmative. As discussed in Point A above, the proration of the shelter allowance both reflects the actual

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* The propriety of the district court's consideration of the paying lodger portions of § 352.30(d), its inclusion of recipients with paying lodgers in the class and its award of relief to them are considered at Point "E", *infra.*

changes in the shelter needs of the public assistance family caused by the addition of another person to the household and excludes that share of shelter cost which the State and local agencies cannot be required to reimburse by reason of the lodger's failure to demonstrate his eligibility for assistance.

The majority's refusal to acknowledge the pro-ration procedure as reasonable is, as is its reliance on presumptions, attributable to its failure to recognize shelter needs as shared and the various shares as separable. As a result, the majority finds that "an alternative means", consisting of individualized determination assessing recipients' needs, must be used when a non-paying lodger is present. App. "A", pp. 15a-17a, 19a.

The alleged requirement of "individualized determinations" of need is both legally unsound and illusory. The legal obligation imposed on the State and local agencies to proceed by "less drastic" "alternative means" would be arguably appropriate if the compelling state interest test were applicable. Since only the "reasonable relation" is applicable to § 352.30(d), the effect of the ruling below is to create a different result by resort to "presumptions" than could be obtained under appropriate legal analysis under the Equal Protection Clause. *Cleveland Board of Education* v. *La Fleur,* 414 U.S. *supra* at 652-653, 656-657, 657-660 (POWELL, J. concurring and REHNQUIST, J. dissenting with BURGER, C.J.). On a practical level, the majority directs that the individualized determinations be made at "fair hearings" offered to the recipients. Although all the factors to be considered at such hearings do not clearly appear from the opinion (App. "A" pp. 5a-6a, 16a and p. 23, *ante.*). Chief among them is a determination of whether or not the presence of the lodger does *in fact* diminish the family's shelter needs. (App. "A" p. 16a, Emphasis original). Since, as noted, the shelter program now recognizes that needs of the public assistance family "diminish" when

the lodger is added to the household, the result would be the same after individualized hearings as it is now under the § 352.30(d). To accept the alternative arguments that the family's needs would not be "diminished" unless the lodger is willing to pay his share of the rent is, of course, to have the family meet the lodger's needs, not their own. If the lodger is "truly needy," then his appropriate course of action is to make application on his own behalf, not to obtain his benefits through a "fair hearing" offered to a recipient. On his application, the local agency would obtain information necessary to determine initial and continuing eligibility and to enforce the lodger's obligation to repay the public funds advanced to him should he become able to do so. See e.g., *Snell* v. *Wyman,* 281 F. Supp. 853, (S.D.N.Y. 1968), *aff'd* 393 U.S. 323 (1969). As Judge Hays recognized, the lodger's failure to seek aid on his own behalf cannot be "put at the State's door" or obviated by attributing his needs to the public assistance family. App. "A" p. 22a.

The paying lodger portions of § 352.30(d) present two questions: first, whether the State and local agencies may treat actual contributions made by the lodger to the public assistance family as income to the family thus reducing the family's needs by the amount of the contributions; and second, whether the State and local agencies may encourage recipients to take in paying or "contributing" lodgers by disregarding a portion of the lodger's contribution in determining the family's needs.

The first question must be answered with the affirmative because the contributions are unquestionably income or a resource of the recipient family and may therefore be set-off against need. This practice has been endorsed by this Court in *King* v. *Smith, supra,* and *Lewis* v. *Martin, supra,* and by HEW, 45 C.F.R. 233.90(A) (App. "G", p. 89a). Indeed, appellees repeatedly stated below that if the State and local agencies had merely sought to reduce

shelter allowances on the basis of the actual contributions of lodgers, they would have no claim.

The second question must likewise be answered in the affirmative since the income disregards of $15 and $60 (boarding lodgers) monthly simply reflect a slight modification of the set-off procedure in favor of the recipient for the purpose of encouraging paying or "contributing" lodgers rather than non-paying lodgers. See p. 11, *ante*.

The state purpose in this regard is not seriously open to question. Insofar as the State has chosen an income disregard procedure and supported that procedure with its own funds, it has selected a reasonable means for achieving this purpose, indeed the same means chosen by the federal government in its grant of certain income exemptions or disregards for employed recipients. See e.g., 42 U.S.C. §§ 609, 630 *et seq*. The amount of the disregards in issue is likewise appropriate. See *Village of Belle Terre* v. *Boraas*, —— U.S. ——, 42 U.S.L.W. 4475, 4477 and n. 5 (April 1, 1974).

Acceptance of the majority's characterization of income disregards as "anomalous" (App. "A", p. 17a) would, of course, require their invalidation regardless of amount and have far ranging implications for current federal and state assistance programs. Further, no proof was offered at the evidentiary hearing to support either the majority's speculation that the income disregards result in monthly "exchanges" of the disregarded amount between the public assistance family and the lodger or its conclusion that the State and local agencies would permit the purpose of the regulation to be frustrated in this manner. See App. "A" pp. 17a-18a.

C. The district court erred in refusing evidence of substantial "contributions" of furnishings made to appellee Hurley by her non-paying lodger. The contributions were relevant to the capacity of the lodger to pay his share of the rent and illustrative of the purposes of § 352.30(d).

Appellants offered the testimony of one of appellee Hurley's caseworkers and documentary evidence showing that appellee Hurley's male lodger, ADR, had made certain gifts to her including wall-to-wall carpeting throughout the three bedroom apartment, an upholstered sofa and arm chairs, a complete bedroom suite, a dinette set and a color console television set. See caseworker's report of "home visit" made on September 15, 1970, App. "H" pp. 97a-99a. Mrs. Hurley must have received these gifts between November 18, 1967, when she received a public assistance grant to purchase furniture which had been largely replaced by the "new" furniture, and September 15, 1970, the date of the "home visit" when the furniture was observed by the caseworker.*

The testimony was excluded after an offer of proof by appellants' counsel and the documentary evidence and pertinent allegations of the Answer were stricken on subsequent motion by appellees. Although the court did not articulate a ground for its rulings, appellants take those rulings as based on the two main points urged by appellees' counsel, lack of relevance and the alleged pendency of appellants' motion for summary judgment which did not refer to the "new furniture" as material facts in dispute.

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* The time can be more closely approximated from the caseworker's report since it appears that the "new furniture" had not been observed in a prior home visit. App. "H" pp. 97a-98a. According to the case file, the prior "home visit" took place between April and July 1, 1969.

As is apparent, there can be only two types of lodgers, those with the financial capacity to pay their share of the rent and those without such capacity. App. "A", p. 22a and discussion *ante*, pp. 10-11. With respect to the former category, § 352.30(d) properly prohibits the diversion of public assistance funds for the benefit of the lodger who refuses to pay the cost of his own shelter, preferring to expend his income on other "needs." The evidence offered to the district court would have shown that ADR was a financially capable lodger who in effect chose to devote substantial resources to Hurley's comfort while also choosing to charge his share of the rent against public funds.

Appellees' objection on the grounds of relevance was principally concerned with the fact that the gifts alleged were not made during the period that the local agency and the state "fair hearing" established that ADR was a non-paying lodger, i.e. from November 1970 through February 1971. While this is true, it does not undercut the relevance of the furniture gifts . As noted, the evidence offered would have established that the gifts were made at a time very close to November 1970, i.e. probably after April 1969 and before September 15, 1970. See discussion above. It is further conceded in the record that ADR was continuously employed during the period of time he was a non-paying lodger, and no change in the nature of his employment was alleged prior to his joining the Hurleys. On the basis of these facts, appellants submit that it was well within the discretion of the district court to conclude that ADR had the financial capacity to pay his pro rata share of the rent during the period that he was a lodger.

Appellees' opposition to the admission of the evidence on the ground that it was not referred to on appellants' motion for summary judgment did not warrant exclusion.

Contrary to the allegations made by appellees, appellants did not have a motion for summary judgment pend-

ing before the three-judge court. The only summary judgment motions by appellants were made on the statutory "pendent" claims before the single district judges in *Hurley* and *Taylor*, not on the constitutional claims. See p. 19, *ante*.* These motions were granted on the Second Circuit appeal. App. "B" pp. 29a, 38a. On remand to the three-judge court, appellants answered and did not move. Thus, the only motion properly before the district court was appellees' motion for summary judgment, not that of appellants.

While appellants agree that the gravaman of the statutory and the constitutional claims was the same and thus that the actions could have been disposed by the three-judge court without further fact finding, an evidentiary hearing was held as the instance of the appellees pursuant to Judge Weinstein's suggestion and notwithstanding their own pending motion for summary judgment. The subject matter of hearing was housing conditions and "living arrangements" among the poor. In this context appellants sought to offer additional facts concerning appellee Hurley's "living arrangements" in relation to the operation of the § 352.30(d). Since those facts were relevant to purpose of the regulation and to the new issues tendered by appellees, they should have been admitted.

D. The district court erred in refusing to dismiss the claims of appellees Taylor and Otey which had become non-justiciable during the course of the proceedings.

The three-judge court was directed to consider whether appellee Taylor's claims had become moot by reason of

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* Appellees moved for the summary judgment in their favor before the single district judges on both the statutory and constitutional claims. Appellants did not make an opposing summary judgment motion on the constitutional claims since these claims, if substantial, had to be referred to a three-judge court. 28 U.S.C. § 2281 *et seq. Goosby* v. *Osser*, 409 U.S. 512 (1973).

Virginia Taylor's restoration to public assistance and her payment of her share of shelter costs from the proceeds of her own grant. Second Circuit majority opinion, App. "B" p. 32a and n. 3. See discussion, *ante* pp. 13-14. Appellee Otey's shelter allowance was restored to the equivalent of the rent when Michael, appellee's adult son and former non-paying lodger, obtained public assistance on his own behalf and left to establish a separate residence. See discussion, *ante* pp. 14-15.

Although apparently accepting appellants' position that the Taylor and Otey claims were no longer justiciable under this Court's decisions in *DeFunis* v. *Odegaard*, —— U.S. ——, 40 L. Ed. 2d 164 (1974); *Hall* v. *Beals*, 396 U.S. 45 (1969) and *Golden* v. *Zwickler*, 394 U.S. 103 (1969), the district court majority nonetheless found that "since the controversy affects many AFDC families and this is a class action, there is no need to decide whether a particular named plaintiff is still being adversely affected by the challenged regulations." App. "A" p. 19a. To the contrary, there was a need to determine the status of the Taylor and Otey claims. As this Court has held, a plaintiff cannot represent a class of which he is not a part. *Bailey* v. *Patterson*, 396 U.S. 31, 32-33 (1962). Accord *Richardson* v. *Ramirez*, —— U.S. ——, 42 L. Ed. 2d 551, 562 (1974). Once the claims of appellees Taylor and Otey were established as non-justiciable, those appellees could no longer be considered as adequate representatives of the class. Proper procedure required that the action proceed in the name of appellee Hurley alone or that appellees Taylor and Otey be substituted with other members of the class who continued to have live grievances. *Gaddis* v. *Wyman*, 304 F. Supp. 713 (S.D.N.Y. 1969).

E. The district court erred in defining the class to include recipients who share households with paying lodgers as will recipients who share households with non-paying lodgers and in invalidating § 352.30(d) in its entirety.*

None of the named appellees shared her household with a paying lodger, and no claim was raised below against the paying lodger portions § 352.30(d). Accordingly no appellee could properly represent a class consisting recipients with paying lodgers, *Bailey* v. *Patterson*, 369 U.S. 31, 32-33 (1962), and there was no controversy before the district court as to these severable portions of § 352.30(d). Indeed, it is dubious whether there could be a serious challenge to the paying lodger portions of § 352.30(d). No recipient can claim to be injured by them since any reduction in need is based on actual contributions, and they are obviously consistent with established principles in the administration of public assistance programs. See discussion pp. 37-38 *ante*. As Judge Oakes noted in his Second Circuit dissent (App. "B" p. 43a n. 5):

> This actual contribution [made by the paying lodger under § 352.30(d)], like all other income, will result in a reduction of the family's benefits under the theory that welfare will only provide the money necessary to bring a family up to its level of need. This

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* The class definition includes "residents of the State of New York . . . who have had their grants of public assistance reduced, terminated, suspended or denied, or who are or may be [so] threatened . . . solely because of the presence of a "lodger" in the home pursuant to 18 N.Y.C.R.R. §§ 352.31(a)(3)(iv) and 352.30(d) . . . ." Judgement and Order of August 15, 1974, App. "E" p. 82a. The failure to use the qualifying term "non-paying" requires that the definition be read to include "paying" lodgers since recipients "grants" are "reduced," "terminated" or "denied" based on the actual contributions of paying lodgers. The definition of the class on appeal to the Second Circuit used the qualified term "non-paying lodger". See footnote p. 19, *ante*. The Judgment and Order also declares "18 N.Y.C.R.R. §§ 352.31(a)(3)(iv) and 352.30(d)" and enjoins their enforcement. App. "E" pp. 82a-83a.

section of the regulation is challenged and, in my view, comports entirely with the intent of the federal and state regulations.

Thus, by reason of its definition of the class and its invalidation of the regulation in its entirety, the district court majority determined the merits of the paying lodger provisions in the absence of an appropriate plaintiff and a claim, without argument on the merits, and awarded relief against provisions which do not adversely affect any recipient. Its Judgment and Order in this regard should therefore be vacated.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York, October 18, 1974.

Respectfully submitted,

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*SHIRLEY TOBY GREITZER, Law Intern, assisted in the preparation of this Jurisdictional Statement.

APPENDIX A

Opinions of the Three-Judge District Court.

UNITED STATES DISTRICT COURTS
FOR SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

72 Civ. 3423

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Plaintiffs,

against

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Defendants.

73 Civ. 699

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Plaintiffs,

against

ABE LAVINE, individually, and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Defendants.

Appendix A.

APPEARANCES:

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Of Counsel

Before HAYS, Circuit Judge, BAUMAN, District Judge, and WEINSTEIN, District Judge.

WEINSTEIN, District Judge:

Plaintiffs complain on behalf of a class of some 10,000 that the New York State regulations automatically reducing

Appendix A.

aid to families with dependent children (AFDC) (42 U.S.C. §§ 601-44) if the recipient houses a non-contributing "lodger" are unlawful both on constitutional and statutory grounds. Separate civil rights actions were brought in the Southern and Eastern Districts of New York. 42 U.S.C. § 1983; 28 U.S.C. § 1343(3); Fed. R. Civ. P. 23.

In each action the District Court sustained plaintiffs' statutory claim without considering the constitutional issues. *Hurley* v. *Van Lare,* 365 F. Supp. 186, (S.D.N.Y. 1973); *Taylor* v. *Lavine* (unreported), Slip Op. 73-C-699 (E.D.N.Y. 1973). The Court of Appeals reversed and remanded the cases "for the convening of a three-judge court to consider the constitutional issues. *Taylor* v. *Lavine,* —— F. 2d ——, ——, Slip Op. 73-2731 at p. 3470 (2d Cir. 1974).

The actions have been consolidated for consideration of the constitutional issues by a three-judge court. 28 U.S.C. §§ 2281, 2284. *Cf. Gaddis* v. *Wyman,* 304 F. Supp. 717, 720 (S.D.N.Y. 1969), *aff'd per curiam sub nom. Wyman* v. *Bowens,* 397 U.S. 49, 90 S. Ct. 813 (1970). It is urged that the New York State "lodger" regulations (1) create an irrebuttable presumption offensive to due process; (2) invade rights to privacy and free association; and (3) deny equal protection of the laws. For the reasons set forth below, we conclude that the regulations in question are unconstitutional.

The AFDC program was designed by Congress "to help maintain and strengthen life," and to encourage recipients "to retain . . . personal independence consistent with . . . care and protection" of dependent children. 42 U.S.C. § 601. As enforced, the state regulations are corrosive of these goals. The nation's generous spirit of concern for the poor, with its concomitant desire to equalize the developmental opportunity of a young generation of impoverished, has been thwarted. Unless checked there is a clear tendency in

such regulations as are before us to strip welfare recipients of the last vestiges of their sense of personal worth, to force them, in words used to describe a group existing on the edge of extinction, to "live on as a people without life, without passion, beyond humanity." C. M. Turnbull, THE MOUNTAIN PEOPLE 295 (Simon & Shuster Touchstone ed. 1972).

I. FACTS

A. CHALLENGED REGULATIONS

The federal AFDC program provides states with matching funds to assist the "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . .". 42 U.S.C. § 606(a). Among the New York regulations under which AFDC funds are distributed are the two challenged here—18 N.Y.C.R.R. § 352.30(d), which reduces a recipient's shelter allowance if the recipient houses a noncontributing "lodger," and 18 N.Y.C.R.R. § 352.31(a)(3)(iv), which treats a man living with a female recipent but not married to her as a "lodger." These regulations read:

> "*A non-legally responsible* [for support of the aided persons] relative or unrelated *person* in the household, who is not applying for nor receiving public assistance shall not be included in the budget and *shall be deemed to be a lodger* or boarding lodger. . . . *In the event a lodger does not contribute at least $15 per month, the family's shelter allowance* including fuel for heating, *shall be a pro rata share of the regular shelter allowance.*" 18 N.Y.C.R.R. § 352.30(d). [Emphasis added.]
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> • • •
>
> "When a female applicant or recipient is living with a man to whom she is not married . . . his available income and resources shall be applied in accordance with the following:
>
> • • •
>
> "(iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(d)." 18 N.Y.C.R.R. § 352.31(a)(3).

Ostensibly New York enacted 18 N.Y.C.R.R. 352.30(d) pursuant to its duty under the federal AFDC program to determine a recipient's actual need by taking "into consideration any other income and resources of any child or relative claiming aid to families with dependent children." 42 U.S.C. § 602(a)(8). Aimed as it is at preventing state welfare funds from going where they are not needed, the regulation makes two alternative irrebuttable presumptions. First, it presumes that a recipient family able to have a noncontributing lodger needs less housing space for its own use and consequently needs less money to pay for less space. The second alternative presumption is that a recipient family able to house a noncontributing lodger—even if the family could not reasonably subsist in less space—somehow needs less money to pay its share of the rent. Apparently the rationale of this presumption is that the lodger could, should, and therefore would, pay his or her proper share of the rent if forced to by a reduction in the recipient family's shelter allowance, for it assumes—irrebuttably—that, at least if he is a male, a "lodger" has "available income and resources." 18 N.Y.C.R.R. § 352.31(a)(3)(iv).

Under the regulations no hearing to determine if, or how, a reduction will adversely affect particular dependent minor children can be had. There can be no hearing to decide

whether in any particular case the presumptions are contrary to the facts. Whether the "lodger" be a sister, a child, or adult companion who helps hold the family unit together, whether this "lodger" can or will contribute towards the rent, and whether the "lodger's" presence saves the state money are all undisputable under the regulations.

B. Those Affected by the Regulations

The backgrounds of the named plaintiffs have been sufficiently set forth in prior published opinions. *See* —— F. 2d —— (2d Cir. 1974); 365 F. Supp. 186 (S.D.N.Y. 1973). Local welfare agencies have reduced or are threatening to reduce the shelter allowances of AFDC recipients on the basis of these regulations: Mrs. Hurley and her three children from $150 to $115 because she lived with a man not her husband; Mrs. Taylor and her two children from $165 to $110 because she allowed her incapacitated sister to stay with her; and Mrs. Otey and her minor son from $145 to $96.65 because she allowed an adult unemployed son to sleep in the apartment

Typical of the factual situations which welfare officials must ignore in applying the mechanical regulation is that related by Mrs. D, who testified at the trial. She and her two minor children reside in Mount Vernon in an apartment characterized by Paul Davidoff, a distinguished urban planner, as "far below a modern standard for decent accommodations for a family of that size." They have received AFDC assistance for approximately the last six and one-half years. She has not seen or heard from her husband since July, 1965; when she attempted to obtain a divorce Legal Aid could not go forward with the case, she testified, because she could not afford necessary disbursements. Over the past six years Mrs. D has been hospitalized some dozen times for surgical and other treatment.

Because of her illnesses and periods of convalescence, plaintiff has not been able to carry out many family and household functions; obviously she is not well and seems aged beyond her years.

A male friend of the family has taken up residence in the D household. During Mrs. D's periods of illness and convalescence, he took care of her and her children, shopped for food, washed the family's clothes, cooked the family's meals, cleaned the house and performed other household tasks. He, himself, has various disabilities including extreme high blood pressure and he is presently unable to work. He is under no legal obligation to support the family and, in fact, has provided no financial support. Because of his presence local welfare officials informed Mrs. D:

> "Quality control reports of 1/15/72 indicated that Mr. [M.] resides with you and your family. Therefore, we are prorating your rent ¾ of $175 = $131.40."

The proposed reduction in Mrs. D's public assistance grant would leave the mother and two children with insufficient funds to purchase those necessities of life—food and clothing—requisite for a minimum standard of living.

Whether the state would save money were the male to leave—or himself successfully apply for a welfare grant, as he probably could—is not clear. In view of the mother's health, one of her social workers informed her that she would be entitled to homemaker and other assistance. The effect on the children, who now refer to the man as "daddy," of his leaving certainly cannot be assumed to be beneficial.

Mrs. D's case is illustrative of many situations where a mother on welfare houses a noncontributing adult male companion. The poor do not necessarily cohabit on a bed of

roses. In the D's case the two sickly adults and two young children abandoned by their father live in substandard accommodations and use broken furniture—purchased from a company to which Mrs. D had been steered by a welfare worker; and the children and mother receive a bare subsistence allotment for food and other necessities.

D's case was put in perspective as typical by Professor Herbert Gans of Columbia University, whose work in the sociology of the poor is well known and highly regarded. He described the reason for the prevalence of such arrangements among the poor as follows:

> ". . . Poor people often live a very insecure existence, not only in terms of the amount of money they have, but the uncertainties about how long they will have it. . . .
>
> "So, quite frequently you do get a pattern among poor people, if they can't work or they can't find work either temporarily or permanently, of moving in with a relative, either temporarily or permanently, because there simply isn't any money to establish or to continue to maintain one's own household. And typically, then, the people then become lodgers, help out in the family in various ways in lieu of paying rent, helping to raise the children, taking care of the house, doing a variety of things. I think that's one major explanation.
>
> • • •
>
> "There are poor people who either feel that their poverty is temporary and don't want to go on welfare, don't want to get involved with being on welfare—welfare itself is a full-time job quite often—you know, filling out of the forms, dealing with the regulations, dealing with the social workers and the case workers, and what have you, and so they simply say we are not going to go on welfare and hope perhaps their problem is temporary. Other people . . . just . . . have the pride of independence, as it is sometimes called, and say they want to make it on their own however that is going to be."

This "doubling up phenomenon among poor people . . . is particularly [prevalent] . . . where the head of the household is a woman." He went on to add:

> " . . . where there is poverty and insecurity people get very dependent on each other to tide them over during crises, so that you have, and this has been found in studies all over the world among poor people . . . [,] a very generous extension of help and hospitality to others, relatives and close friends.
>
> "And this exists not because poor people are necessarily more altruistic or more generous than other people, but because this is really the only way you can survive in a crisis. If you don't have somebody who you can rely on to bail you out with a couple of dollars to get you to the hospital, if one of your kids suddenly gets sick, to provide you a room if your landlord evicts you or if your building burns down or becomes uninhabitable, if this ability to call on somebody for help is not available, then survival for the poor is much more risky. And so what happens is you get a pattern of mutual help, of mutual obligation, people helping each other because they know if they help somebody when they have a problem they will be helped in return.
>
> "One part of this helping phenomenon is people making room in their house for somebody who is in need of shelter temporarily or permanently, and again only in this case on the grounds that if I don't do it for him or her now, he won't do it for me when I am faced with that problem."

Appendix A.

As Dr. Gans pointed out, "This is a very important phenomenon that middle class people don't do much of and don't understand."

It is this need for mutual help that explains, Dr. Gans noted, why housing, which is already inadequate, is shared with others:

> "... especially [in] the New York area, they get small apartments with small rooms, if they are [on] Welfare ... so they live in a minimum space to begin with.
>
> "When somebody else comes in they become more crowded, obviously. But the exchange—they make this sacrifice because again this is a perfect example of obligation of mutual help that I discussed earlier. You make a sacrifice because then you obligate the other person to help you when you are in need."

The effect of enforcing regulations such as we have before us is to force the man out of the house. As Dr. Gans testified:

> "... divorce has always been very difficult for the poor to get because (a) it costs money to get divorced, (b) it costs money to get a lawyer, until recently it was impossible for poor people to get free legal help, so that there has been a long tradition of simply physical separation but no divorce."
>
> • • •
>
> "... I am talking generally [about] what happens in the poor community.
>
> "Quite often the relationship between men and women is a very fragile one, particularly when the men are ... economically marginal in society and told that they are not useful economically, (a) the men don't have much money, (b) their egos are very sensitive and they

Appendix A.

> might just say well, if you ask me to pay I will just move out on you and that would be the end of—in essence, the relationship would be sacrificed to whatever the rental money was.
>
> "... if the lodger is a man who is living with a woman, he becomes a lodger to serve a variety of functions in the family, helping raise the children, taking care of the house, I think the relationships are such that if the woman asked him for money, in most cases he doesn't have it, even if he had it he might say well, if you put it on that basis, I will just move out and then the woman is deprived of the relationship with the man which is part of life and of the fatherly functions that this kind of lodger often performs."

II. The Law

A. The Due Process Claim

As the Supreme Court again noted this Term in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 644, 94 S. Ct. 791, 798 (1974), declaring invalid a presumption that pregnant women were incapacitated from teaching, "'permanent, irrebuttable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments.'" There is no warrant for automatic denial of a right on the basis of an irrebuttable presumption, "when that presumption is not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination." *Vlandis* v. *Kline*, 412 U.S. 441, 452, 93 S. Ct. 2230, 2236 (1973) (irrebuttable presumption of non-residency of student invalidated). *See also, e.g., United States Dep't of Agriculture* v. *Murry*, 413 U.S. 508, 93 S. Ct. 2832 (1973) (denying food stamp eligibility on basis of irre-

buttable presumptions of lack of need unconstitutional); *Stanley* v. *Illinois,* 405 U.S. 645, 92 S. Ct. 1208 (1972) (irrebuttable presumption preventing unwed father's custody of child violative of due process); *Stewart* v. *Wohlgemuth,* 355 F. Supp. 1212 (W.D. Pa. 1972) (irrebuttable presumption terminating welfare benefits of college students violative of due process); *Owens* v. *Parham,* 350 F. Supp. 598 (N.D. Ga. 1972) (irrebuttable presumption reducing shelter allowance on ground members of household bear pro rata share of expenses violative of due process); *Boucher* v. *Minter,* 349 F. Supp. 1240 (D. Mass. 1972) (irrebuttable presumption terminating shelter allowance where stepfather lives in same house violative of due process).

1. The Presumptions Relied Upon by the State

A. *Less space needed if "lodger" present.*

The presumption that a recipient family able to house a noncontributing lodger needs less space for its own use "is not necessarily or universally true in fact." The lodger may be an older child sharing a single or bunk bed with a younger sibling, or a disabled relative sleeping on the couch. If the lodger is the mother's adult male companion, he may be sharing the mother's own bed. None of these plausible factual circumstances fairly imply that the family could realistically subsist in less space.

Moreover, even if we were to assume that a family able to house a noncontributing lodger needs less space for its own use, under present conditions many families could not locate habitable smaller quarters. Plaintiffs' housing expert, Mr. Paul Davidoff, gave uncontradicted testimony that in the New York City metropolitan area, the poor live in housing that is predominantly substandard and in-

adequate in terms of space, and that, therefore, it is highly unlikely that a family on welfare could find and move into a liveable smaller apartment.

The almost zero vacancy rate for low-rental housing in large parts of New York State supports Mr. Davidoff's conclusion. *See, e.g., Talbot* v. *Romney,* 321 F. Supp. 458, 470 (S.D.N.Y. 1970) (vacancy rate drop from 3.2% in 1965 to 1.2% in 1968); *Parkwood Realty Co.* v. *Marcano,* 353 N.Y. Supp. 2d 623, 625 (N.Y.C. Civ. Ct. 1974); 1970 Census of Housing, Detailed Housing Characteristics: New York 34-167, 34-171; State of New York, Executive Department, Division of Housing and Community Renewal, Survey Report on Rental Housing 3 (1969); J. C. Lynn, Recent Housing Trends in Westchester County 7, 8 (Westchester Planning Occasional Papers, Winter 1974); Report on Housing and Rents of the Temporary State Commission on Living Costs and the Economy 72-73 (1974); Economic Consultants Organization, Inc., Residential Analysis for Westchester County, Growth of Demand and Supply: 1970-1990, Interim Report No. 3, 50 (1970); Interim Report No. 5, 47 (1970). Low cost housing available to welfare recipients is further constricted by negative community attitudes toward minority groups and subsidized housing (Interim Report No. 5; *supra,* at p. 47; Interim Report No. 3, *supra,* at pp. 3-4) and the lack of institutional financing available for buildings currently housing recipients. City of New York, The Urban Housing Dilemma: The Dynamics of New York City's Rent Controlled Housing 551-53 (Prel. undated). Negative attitudes of landlords and apartment owners toward public assistance recipients also limits availability. City of New York, The Urban Housing Dilemma, *supra,* at pp. 555-56, 564-66.

The welfare recipient is put at more of a disadvantage in the ever shrinking housing market since she or he lacks

"contacts" and entries into the market system. Fewer than 10% of recipients obtain housing through the Department of Social Services in Westchester County. INTERIM REPORT No. 7 (1970), *supra,* at pp. xii, 101. "Urban renewal and construction of public housing have had little impact on the number of units available to low income households. In most instances, new units built merely replace existing units removed from the stock." INTERIM REPORT No. 3, *supra,* at p. 3. The long waiting lists for public housing are well known.

It is apparent, therefore, that even if a family housing a noncontributing lodger could subsist without the lodger in a smaller apartment, the family probably could not locate decedent smaller quarters. In that event, the family's rental expenses would remain as high as they were before the lodger came; there would be no diminution of financial need.

If not for the challenged regulations and the irrebuttable presumptions they make, we would have thought it beyond debate that a family on public assistance might choose to house a noncontributing lodger for many reasons other than the presumed excess of living space. For example, a recipient might agree out of familial kindness and generosity to shelter a family member or relative who might otherwise suffer. Or a lonely mother raising her fatherless children might house a friend out of a deep, human need for supportive, adult companionship. A welfare regulation encouraging a woman in Mrs. D's circumstances to remove her "lodger" exacerbates the familial disintegration already experienced by the urban poor.

In short, the presumption that a recipient family able to house a noncontributing lodger needs less space for its own use is neither necessarily nor universally true in fact. The evidence before us shows it has no basis in fact for many AFDC families.

B. *Less financial need where "lodger" present.*

Similarly, the second, alternative, presumption that a recipient family able to house a noncontributing "lodger" —even if the family does not *ipso facto* need less space for its own use—needs less money to pay its own, *pro rata,* share of the rent is neither necessarily nor universally true. Unless the lodger pays a "share" of the rent, the family's rental expenses are not affected by the "lodger's" presence.

But the state may not conclusively presume that a lodger will pay his share of the rent, under the compulsion of a reduced shelter grant, merely because ethically he should or theoretically he could. *See* R. M. O'Neil, THE PRICE OF DEPENDENCY 253-254 (1970) (reasons why many people eligible for relief do not seek it); F. F. Piven & R. A. Cloward, REGULATING THE POOR 165 (Vintage ed. 1972) ("degradation at the hands of relief officials . . . deters actual or potential workers from seeking aid."). "[F]ederal law prohibits a conclusive presumption of support." *Taylor* v. *Lavine,* —— F. 2d ——,——Slip Op. 73-2731 at p. 3477 (2d Cir. 1974). We know from the evidence before us that some AFDC family "lodgers" do not pay anything towards rent.

Certainly "the state has reasonable alternative means of making the crucial determination" (*Vlandis* v. *Kline,* 412 U.S. 441, 452, 93 S. Ct. 2230, 2236 (1973)) as to space and contribution where a lodger is present or believed present. That alternative means is the "Fair Hearing," a proceeding provided by 18 N.Y.C.R.R. § 358.1-24 to review the reduction of AFDC grants.

Making these individualized determinations may not completely serve the cause of "administrative efficiency" but as the Supreme Court stated in *Stanley* v. *Illinois,* 405

U.S. 645, 656, 92 S. Ct. 1208, 1215 (1972):

> "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." (Footnote omitted.)

See also Cleveland Board of Education v. *LaFleur,* 414 U.S. 632, 646, 94 S. Ct. 791, 799 (1974).

Irrebuttable presumptions are offensive to due process because they effectively deny an individual the essential procedural right to challenge the purported factual basis of a determination adversely affecting his own liberty or property. In this case the "property" right in question is the AFDC recipient's statutory entitlement to a shelter allowance commensurate with actual need. Thus the rule against irrebuttable presumption is an aspect of procedural, not substantive, due process. *See Vlandis* v. *Kline,* 412 U.S. 441, 455, 93 S. Ct. 2230, 2238 (1973) (Marshall, J., concurring, joined by Brennan, J.); *see also* Note, The Supreme Court, 1972 Term, 87 Harv. L. Rev. 57, 70 n. 21 (1973); *cf. Bell* v. *Burson,* 402 U.S. 535, 91 S. Ct. 1586; (1971); *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S. Ct. 1011 (1970).

Before reducing the shelter allowance of a recipient family because the family houses a noncontributing lodger, the state must make an individualized determination of whether the presence of the lodger does *in fact* diminish the family's shelter needs. If presumptions are used they must be rebuttable. *See* Proposed Federal Rules of Evidence

301, promulgated by the Supreme Court but not yet effective. This constitutionally required result is consistent with the statutory mandate of the federal AFDC program. *See, e.g., Shea* v. *Vialpando,* —— U.S. ——, 94 S. Ct. 1746 (1974); *Lewis* v. *Martin,* 397 U.S. 552, 90 S. Ct. 1282 (1970); *King* v. *Smith,* 392 U.S. 309, 88 S. Ct. 2128 (1968); *Hausman* v. *Dep't of Institution & Agencies,* 64 N.J. 203, 314 A. 2d 362, *cert. denied,* —— U.S. ——, ——, S. Ct. —— (1974); *Rosen* v. *Hursh,* 464 F. 2d 731 (8th Cir. 1972); *Mothers and Childrens Rights Org., Inc.* v. *Stanton,* 371 F. Supp. 298 (N.D. Ind. 1973); *Gaither* v. *Sterrett,* 346 F. Supp. 1095 (N.D. Ind.), *aff'd,* 409 U.S. 1070, 93 S. Ct. 688 (1972); *X* v. *McCorkle,* 333 F. Supp. 1109 (D.N.J. 1970); *aff'd per curiam sub nom. Engelman* v. *Amos,* 404 U.S. 23, 92 S. Ct. 181 (1971); *Gilliard* v. *Craig,* 331 F. Supp. 587 (W.D.N.C. 1971), *aff'd,* 409 U.S. 807, 93 S. Ct. 39 (1972), *reh. denied,* 409 U.S. 1119, 93 S. Ct. 892 (1973); *Jenkins* v. *Georges,* 312 F. Supp. 289 (W.D. Pa. 1969); *Solman* v. *Shapiro,* 300 F. Supp. 409 (D. Conn.), *aff'd,* 396 U.S. 5, 90 S. Ct. 25 (1969); *Battle* v. *Lavine,* 44 App. Div. 2d 307, 354 N.Y.S. 2d 680 (2d Dep't 1974). *See also* 45 C.F.R. 233.20(a)(1); 233.20(a)(3)(ii); and 233.90(a).

III. Other Claims

A. Anomaly in Regulation

Under state administrative interpretations section 352.30(d) requires a "lodger" to contribute only $15.00 per month to the recipient family's rent; it does not require the lodger to pay a "pro rata share" of the rental. To encourage the taking in of rent-paying lodgers the first $15.00 of lodger income is, under the regulation, ignored. As one of the state's witnesses admitted, the New York statutory lodger policy achieves this anomalous result: if a lodger pays $15.00 per month, the recipient family has nothing de-

ducted from its shelter allowance; but if the lodger pays less than $15.00 or nothing at all, the family has a full, pro rata share of its shelter allowance—in some of the instances before us as much as $50.00—deducted.

The head of a household on welfare might, the witness conceded, avoid the impact of § 352.30(d) altogether by loaning a lodger $15.00 per month to enable him to make a $15.00 rental contribution and then later cancelling the loan if it was not repaid. Generally, however, welfare families are not skilled in the art of self-interested financial manipulation. The possibility, therefore, that all members of the class might evade the regulation does not make it illusory and has no effect on its invalidity.

B. Sex Discrimination

It is not clear that New York's statutory lodger policy makes a distinction on the basis of sex. While § 352.31(a)(3)(iv) is limited by its terms to a "male" lodger, this section is apparently superfluous. Section 352.30(d) speaks of a "non-legally responsible relative or unrelated *person*" (emphasis added); this section, standing alone, presumably would apply to a female living with but not married to a father-recipient no less than a male living with but not married to a mother-recipient.

C. Free Association and Privacy

The State of New York is entitled—and as a participant in the federal AFDC program is under a duty—to determine actual need in granting welfare, including shelter assistance. Inquiring whether a lodger's presence in fact indicates a diminished need for shelter assistance is hardly a violation of plaintiffs' rights. The constitutionally protected rights of free association and privacy do not compel the states to misallocate their scarce welfare resources. The

problem with the regulations under challenge here is not that they somehow invade rights of free association or privacy, but that they do not determine *actual* needs; rather they proceed on the basis of irrebuttable presumptions neither necessarily nor universally true in fact. Only if the challenged regulation sought to prescribe plaintiffs' familial or sexual life style, would the free association-private claim merit further consideration. *See United States Dep't of Agriculture* v. *Moreno,* 413 U.S. 528, 93 S. Ct. 2821 (1973).

D. Equal Protection

Plaintiffs also claim that the challenged regulations deny them equal protection of the laws. The challenged regulations distinguish between two groups of welfare recipients: those who house a non-contributing lodger and those who do not. The purported objective of this distinction is a constitutionally appropriate one since, as we have pointed out, New York may seek to allocate its scarce welfare resources where they are most needed. The related issue of whether there is a factual basis making at least rational the legislative judgment that families housing noncontributing lodgers have a diminished need for shelter allowance, must be resolved by individualized determinations in accordance with the mandate of due process. In the circumstances of this case, the equal protection claim overlaps analytically with the due process claim. It is, therefore, unnecessary to articulate a separate equal protection ground of decision.

E. Mootness

Since the controversy affects many AFDC families and this is a class action, there is no need to decide whether a particular named plaintiff is still being adversely affected by the challenged regulations. *Taylor* v. *Lavine,* —— F. 2d ——, ——n. 3, Slip Op. 2731 at 3473 n. 3 (2d Cir. 1974).

Appendix A.

Where there are numerous class members who suffer the same harm complained of by the named plaintiffs, or who are subject to like treatment in the future, the action does not become moot as to them and there remains a justiciable controversy. *See, e.g., Richardson* v. *Ramirez,* —— U.S. ——, —— S. Ct. ——, Slip Op. 72-1589 at pp. 14-15 (1974); *Johnson* v. *New York State* Education Dep't, 409 U.S. 75, 76, 93 S. Ct. 259, 260-61 (1972) (Marshall, J., concurring); *Jenkins* v. *United Gas Corp.,* 400 F. 2d 28 (5th Cir. 1968); *Steinberg* v. *Fusari,* 364 F. Supp. 922, 928 (D. Conn. 1973), appeal pending, —— U.S. ——, 94 S. Ct. 1406 (1974).

IV. Conclusion

Section 18 N.Y.C.R.R. § 352.30(d) and § 352.31(a)(3)(iv) are invalid to the extent stated in this opinion. The parties shall settle an order on forty-eight hours notice.

So ordered.

Date: New York, New York

August 5, 1974

Jack B. Weinstein
Arnold Bauman

Hurley v.
Van Lare

Hays, *Circuit Judge,* dissenting:

I dissent.

The challenged regulation, 18 N.Y.C.R.R. § 352.30(d), is not unconstitutional. It sets up no "irrebutable presumption . . . not necessarily or universally true in fact." *Vlandis* v. *Kline,* 412 U.S. 441, 452 (1973).

In *Taylor* v. *Lavine,* Docket No. 73-2731, slip op. at 3465 (2d Cir. 1974), the Second Circuit considered the validity of section 352.30(d) in light of section 406 of the Social

Appendix A.

Security Act, 42 U.S.C. § 606(a)(1970), and 45 C.F.R. § 233.90(a). In *Taylor* the court held that section 352.30(d) does not create an irrebutable presumption of contribution offensive to section 406(a) or the federal regulation.[1] It reasoned that prorating shelter costs between AFDC-eligible and non-eligible members of a household insures that AFDC funds are disbursed only to individuals who have demonstrated their need for assistance. It found that the New York regulation is reasonably justified by considerations such as the severability of individual needs, the divisibility of space, and the economies of scale that result from combining small living units into larger groups:

> "Prorating housing costs between the recipient and non-recipient simply reflects the separability of the need of the AFDC-eligible family members from the needs of persons who have not demonstrated their eligibility for public assistance. Indeed, if a seection 352.30(d) lodger can separately demonstrate his eligibility for public aid, the AFDC shelter allowance is increased to include his share. . . ." *Taylor* v. *Lavine,* Slip op. at 3477-78.

The *Taylor* holding controls the present case. A non-contributing lodger, like the majority's Mr. M., must by necessity either have the means to make a pro rata contribution to the recipient household, or he must lack such means. If the lodger is financially able to contribute to the cost of maintaining the household, New York surely does not offend due process by abating the shelter allowance of the AFDC recipient pro rata according to the lodger's share. If the lodger is not financially able to contribute his share, New York permits him to establish his separate eligibility for public assistance. We have been assured that New York does not require persons of demonstrated need to go without shelter. Should the lodger establish his eligibility,

it is admitted by all parties that a household like the Mrs. D-Mr. M. household would receive a shelter allowance increased over the amount received by the D household alone.[2]

It is thus clear that the New York regulation "presumes" that a lodger has the will and means to contribute his or her fair share toward housing expenses unless the lodger demonstrates separate eligibility for public assistance. Any "presumption" of the lodger's means may be refuted at the lodger's initiative in the same forum in which the AFDC recipient was initially required to establish a need for aid. The "conclusive presumption" denounced by the majority is the same "presumption" that attaches to every member of our society: that he is able to pay his own way until and unless he demonstrates the contrary. If the lodger is eligible for public assistance but does not apply, his silence cannot be put at the state's door. If the lodger is too proud to accept welfare—Mrs. D's testimony indicates that such was Mr. M's motive for not applying for aid—then he ought to be too proud to accept aid from the state indirectly through the eligible AFDC recipient. A noncontributing lodger like Mr. M. has and eats his public assistance cake without demonstrating his need.

The majority states that the aid recipient's "Fair Hearing" under 18 N.Y.C.R.R. § 358.1-358.27 is a "reasonable alternative means" for determining the amount of a lodger is willing or able to pay toward the cost of housing. But this statement glosses over the obvious difficulty of determining the means or intent of a person who has not put his affairs before the Social Services Department by applying for public assistance. In none of the recent Supreme Court due process cases cited by the majority did the reasonable alternative means of factfinding entail intrusion into the affairs of any person who did not apply for or seek a governmentally administered benefit or right.

Section 352.30(d) does not "exacerbate [ ] the familial disintegration already experienced by the urban poor." It does not necessarily upset the established patterns of cooperation between people of limited and uncertain means. So long as each member of a group cooperating as a household establishes his eligibiiit yfor public funds, cooperating will increase the shelter allowance due the whole. In any event, the procedure implicitly sanctioned by the majority, requiring the lodger to submit his affairs to the New York Social Services Department in the context of the AFDC recipient's "Fair Hearing," is surely no less conducive to "familial distintegration" than requiring the lodger to demonstrate his need on his own application.

While assailing the rationality of section 352.30(d), today's majority embraces irrationality. It creates a unique class of persons who may receive the benefit of state aid without demonstrating any need for such aid. It prefers lodgers in AFDC recipient households over all other lodgers. It prefers lodgers in AFDC households over the eligible AFDC recipients themselves, since the latter must bear the burden of demonstrating their eligibility. In our complex society there are no simple means of identifying households in need of state assistance, or of allocating the limited stock of resources among individuals who have demonstrated a need for such assistance. Section 352.30(d) is a valid attempt by New York to make such an allocation and it ought to be upheld.

FOOTNOTES

[1] The *Taylor* court remanded the case so that the constitutional issues might be considered by a three-judge district court. The present case is the result of that remand. The opinion of the present majority ignores the *Taylor* rationale and in effect holds that section 406(a) of the Social Security Act and 45 C.F.R. § 233.90(a) are unconstitutional as applied in the Second Circuit.

[2] Under locally administered regulations, shelter allowances increase in rough proportion to the number of eligible persons in the recipient household. Were Mr. M. to establish his eligibility for public assistance there would be an additional eligible person in the household, and the shelter allowance would accordingly be increased.

APPENDIX B

Opinions of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 669 & 701—September Term, 1973.

(Argued December 21, 1973 Decided May 14, 1974.)

Docket Nos. 73-2731
73-2671

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Appellees,

v.

ABE LAVINE, individually, and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Appellants.

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Appellees,

v.

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually, and in his capacity as Commissioner of the Department of

Appendix B.

Social Services of the State of New York, LOUIS P. KURTIS, individually, and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants.

Before:

FRIENDLY, HAYS and OAKES,

Circuit Judges.

Appeals from orders entered in the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge,* and the United States District Court for the Southern District of New York, Arnold Bauman, *Judge,* enjoining appellants from enforcing the New York Department of Social Services Regulations, 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv), and declaring those regulations contrary to 45 C.F.R. § 233.90(a).

Reversed and remanded.

MARTIN A. SCHWARTZ, The Legal Aid Society of Westchester County, White Plains, New York (Leonard S. Clark, Nassau County Law Services Committee, Inc., Hempstead, New York, on the brief; Lawrence S. Kahn, The Legal Aid Society of Westchester County, White Plains, New York, of counsel), *for Appellees.*

JUDITH A. GORDON, Assistant Attorney General of the State of New York (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, on the brief, Constance M. Margolin, Assistant Attorney General, of counsel), *for Appellants.*

Appendix B.

HAYS, *Circuit Judge*:

This court is again called upon to pass on a challenge to New York's administration of its program for state Aid to Families with Dependent Children (AFDC).

The federal AFDC program found in sections 401 to 444 of the Social Security Act of 1935, as amended, 42 U.S.C. §§ 601-644 (1970), provides financial aid to states on a matching funds basis to assist the "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . . .", 42 U.S.C. § 606(a) (1970). Each state wishing to qualify for sums appropriated by Congress must submit a plan for "aid and services to needy families with children," 42 U.S.C. § 601 (1970). The plan must contain each provision on the list set forth in section 402(a) of the Social Security Act and must be approved by the Secretary of Health, Education and Welfare, 42 U.S.C. § 602(b) (1970). Among the requirements found in section 402(a) are that the state plan furnish aid "with reasonable promptness to all eligible individuals," 42 U.S.C. § 602(a)(10) (1970), and that the state agency in determining need "take into consideration any other income and resources of any child or relative claiming aid to families with dependent children." 42 U.S.C. § 602(a)(7) (1970). New York has submitted such a plan and from time to time amended it. The plan and amendments have been approved by the Secretary.

Among the New York regulations under which AFDC funds are distributed are 18 N.Y.C.R.R. § 352.30(d), which reduces the maximum shelter allowance available to a recipient family pro rata to the extent that there are non-eligible lodgers living in the household, and 18 N.Y.C.R.R. § 352.31(a)(3)(iv), which treats a man living with a female recipient but not married to her as a "lodger." Plaintiffs Hurley, Taylor and Otey challenged these regu-

Appendix B.

lations in separate actions in two federal district courts as creating a conclusive presumption offensive to due process, as denying them the equal protection of the laws, and as invading their rights to privacy and free association. They also claimed that the regulations are in effect "substitute parent" regulations forbidden for state plans by section 406(a) of the Social Security Act and 45 C.F.R. § 233.90(a) (1973). The single district judge upheld the statutory claims and thus found it unnecessary to consider whether a court of three judges should be convened under 28 U.S.C. § 2281.

The New York regulations in question provide as follows:

> "When a female applicant or recipient is living with a man to whom she is not married . . . his available income and resources shall be applied in accordance with the following:
>
> • • •
>
> "(iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(d)."[1] 18 N.Y.C.R.R. § 352.31(a)(3).
>
> "A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding

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[1] In the version of 18 N.Y.C.R.R. before the district courts, 18 N.Y.C.R.R. § 352.31(a)(3)(iv) referred to section 352.30(c), rather than to section 352.30(d). The *Hurley* district court held that the reference was erroneous, that it should have been to section 352.30(d). —— F. Supp. —— at n.1. Appellants, state officials entrusted with administering the regulation, did not contest that determination. The text of section 352.31(a)(3)(iv) was amended effective April 2, 1973, to refer to section 352.30(d).

lodger. . . . In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance." 18 N.Y.C.R.R. § 352.30(d).

45 C.F.R. § 233.90(a) (1973) provides as follows:

"A State plan under title IV-4 of the Social Security Act [relating to the AFDC program] must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extend [sic] that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a 'substitute parent' or 'man-in-the-house' or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions."

The district court in each of the two cases found the New York regulations offensive to the Social Security Act and 45 C.F.R. § 233.90(a), and accordingly granted declaratory and injunctive relief. We reverse and remand for the convening of a three-judge court to consider the constitutional issues raised by the appellees.

I.

The facts in both cases are uncontroverted.

A. *Hurley* v. *Van Lare.*

Appellee Rose Hurley lives with her three dependent children, aged ten, five and five years, in Mount Vernon, New York. She and her children have been living apart from her husband since 1967; she has had no contact with him since 1967 and does not know where he is. The Hurleys receive public assistance under the New York AFDC plan as it is administered by the Westchester County Department of Social Services.

During the four-month period from November 1970 to February 1971, an unrelated male friend of Mrs. Hurley stayed with her and her children at their Mount Vernon residence. The friend was under no legal obligation to support the Hurleys, and in fact he made no contribution to their support. His presence did not increase the amount of rent that Hurley was obliged to pay, $150.00 per month. During the same four-month period, the Westchester Department of Social Services deducted $35 per month from Hurley's recurring AFDC grant, presumably in accordance with 18 N.Y.C.R.R. § 352.30(d).

On November 12, 1970, Hurley requested a "Fair Hearing," a proceeding provided for in 18 N.Y.C.R.R. §§ 358.1-358.27, to review the reduction of her AFDC grant. A hearing was held on March 22, 1971, and on September 20, 1971, appellant Van Lare, the Acting State Commis-

sioner of the Department of Social Services, rendered a "Decision after Fair Hearing" in which he found the facts to be substantially as stated above. He upheld the determination of the Westchester County Department that Hurley's grant should be reduced, but diminished the amount of the reduction to $30.00.

Thereafter, on August 11, 1972, Hurley brought an action in the District Court for the Southern District of New York on behalf of herself and all others similarly affected by sections 352.31(a)(3)(iv) and 352.30(d) to secure declaratory relief, an injunction against enforcement of the regulations, and judgment for retroactive AFDC payments.

Defendants Van Lare and Lavine, appellants here, are respectively Acting Commissioner and Commissioner of the Department of Social Services of New York, and defendant Kurtis is Commissioner of Social Services for Westchester County.

Hurley based her demand for an injunction on the theory that she has not associated with her friend out of fear that her public assistance grant will be reduced, as it was in November 1974, by the enforcement of sections 352.31(a)(3)(iv) and 352.30(d). She contended that the regulations are offensive to the Due Process and Equal Protection Clauses of the Fourteenth Amendment, that they are in violation of her rights of privacy and free association, and that they are invalid under sections 402 and 406 of the Social Security Act, 42 U.S.C. §§ 602, 606 (1970), and 45 C.F.R. § 233.90(a).

The district court did not convene a three-judge court under 28 U.S.C. § 2284 (1970) to consider the merits of the constitutional claims. See 28 U.S.C. § 2281 (1970). But the district court determined that at least the Due Process claim is sufficiently substantial to vest the court with subject matter jurisdiction under 28 U.S.C. § 1343(3) (1970), and that under the doctrine of pendent subject matter jurisdiction it had the power to decide the statutory claim.

On Hurley's motion for summary judgment, the district court held that the New York regulations violate section 406 of the Social Security Act and 45 C.F.R. § 233.90(a), as interpreted by the Supreme Court in *King* v. *Smith*, 392 U.S. 309 (1968), and *Lewis* v. *Martin*, 397 U.S. 552 (1970):

> "[T]he inevitable result of these regulations is to reduce, perhaps drastically, the stipend for those who are eligible. In the case of a mother with one child, for example, the presence of a non-contributing made lodger would reduce the rental stipend by 33⅓%. This devastating reduction means in practice that rental payments must be met out of that portion of the welfare stipend allotted for food and clothing.
>
> "The [New York] regulations thus conflict directly with § 233.90 . . . . Despite the defendants' protestations to the contrary, a *pro rata* reduction does indeed assume that the male lodger will pay his own way, whether or not he actually does. That is precisely the assumption found impermissible in *King* and *Lewis*." —— F. Supp. at ——.

In granting summary judgment, the district court gave declaratory relief and enjoined appellants from enforcing the challenged regulations, but denied Hurley's claim for retroactive welfare payments.[2] The district court also granted Hurley's motion that the action be designated a class action under Rule 23(c).

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[2] The district courts properly denied retroactive payments, relying on our decision in *Rothstein* v. *Wyman*, 467 F.2d 226, 235 (2d Cir. 1972), cert. denied, 411 U.S. 921 (1973), which has recently been approved by the Supreme Court in *Edelman* v. *Jordan*, —— U.S. ——, 42 U.S.L.W. 4419, 4423 (Mar. 25, 1974).

Appendix B.

The appellants have appealed the order granting the summary judgment and class action motions, and Hurley has appealed the denial of retroactive benefits.

B. *Taylor and Otey* v. *Lavine.*

Annie Taylor, her six-year-old child, and her sister, Virginia Taylor, live together in Freeport, Long Island. Annie Taylor and her child receive public assistance under the New York AFDC program as it is administered by the Nassau County Department of Social Services. Prior to January 1, 1973, the sister had received aid under the state home relief program, but after that date she received no public assistance. The sister is under no legal obligation to support Annie Taylor or her child, and she in fact makes no contribution to Taylor's $180 monthly rental.

Prior to January 1, 1973, the three Taylors were receiving $155 per month in shelter allowance, the maximum allowance available for a household of three persons according to a schedule issued by the Nassau County Department of Social Services. When the sister was dropped from the home relief program, Annie Taylor's shelter allowance was reduced to $110.00, two-thirds of $155, under 18 N.Y.C.R.R. § 352.30(d). Taylor requested the maximum shelter allowance for two persons, $145.00. Her request was denied. She demanded and received a "Fair Hearing" at which facts were found substantially in accordance with the foregoing statement. Because the diminished shelter allowance was not enough to pay her rent, Taylor fell behind in her rental payments and was eventually the subject of an eviction order.[3]

[3] The eviction order was nullified when Taylor paid her overdue rent out of the proceeds of her April 1973 grant, a grant increased to the pre-January 1, 1973, level because of the fact that her sister began to receive aid under the joint federal-state Aid to the Disabled Program on March 14, 1973. On the basis of the limited record before us we do not decide whether Taylor's claim for declaratory and injunctive relief is moot. On remand, the district court should consider whether her claim presents a justiciable controversy. See *Hall* v. *Beals,* 396 U.S. 45, 48 (1969); *Golden* v. *Zwickler,* 394 U.S. 103, 108 (1969).

Appendix B.

Plaintiff Charlotte Otey and her thirteen-year-old son, like the Taylors, reside in Freeport, and are recipients of AFDC aid. When Otey's 23-year-old son, not a public assistance recipient, moved into the Otey apartment in October, 1972, Otey's shelter allowance was reduced from $145.00, the maximum allowance for two people, to $96.65, two-thirds of the maximum. Otey demanded an opportunity for a "Fair Hearing." which was granted, but she failed to appear.

Taylor and Otey brought an action in the Eastern District of New York, making claims similar to those asserted in *Hurley* v. *Van Lare,* and seeking similiar relief, except that they did not contest the validity of 18 N.Y.C.R.R. § 352.31(a)(3)(iv). Defendant Shuart is Commissioner of the Department of Social Services of Nassau County. The district court granted the plaintiff's motion for summary judgment, and gave the declaratory and injunctive relief sought, adopting the *Hurley* district court's "reasoning on class action status, jurisdiction, inconsistency of the state regulation and injunctive relief. . . ." It denied retroactive AFDC payments.

Lavine and Shuart appeal from the summary judgment.

II.

Without passing on the constitutional claims, we agree they are sufficiency substantial to support jurisdiction under the liberal test the Supreme Court has recently announced in *Goosby* v. *Osser,* 409 U.S. 512 (1973). Where the constitutional claim is sufficient to vest the district court with jurisdiction, it is proper for a single judge to decide the statutory question under pendent jurisdiction,

Hagans v. *Wyman,* —— U.S. ——, 42 U.S.L.W. 4381 (Mar. 25, 1974), and, if he sustains it, to defer requesting a three-juge court under 28 U.S.C. § 2281, pending review.

Hurley, Taylor and Otey base their claim that the New York regulations are contrary to federal law on two Supreme Court decisions: *King* v. *Smith,* 392 U.S. 309 (1968), and *Lewis* v. *Martin,* 397 U.S. 552 (1970). On careful consideration of these cases, it is clear that neither justifies the district courts' interference with New York's program for distributing AFDC grants.

In *King* v. *Smith,* 392 U.S. 309 (1970), Alabama AFDC recipients brought an action to enjoin enforcement of a state regulation which provided that "an 'able-bodied man, married or single, is considered a substitute father of all the children of the applicant . . . mother' . . . if 'he lives in the home with the child's natural or adoptive mother for the purpose of cohabitation.' " 392 U.S. 313-14 (emphasis deleted). The effect of the regulation under Alabama law was to remove the family from the category of aid recipients created by section 406(a) of the Social Security Act: because of the presence of the "substitute father," Alabama presumed that there was no "continued absence . . . of a parent." 42 U.S.C. § 606(a) (1970). The Supreme Court held that the Alabama rule "defines 'parent' in a manner that is inconsistent with § 406(a) of the Social Security Act." 392 U.S. at 333. Reasoning that the purpose of the federal AFDC program is to protect and benefit needy and dependent children, the Court said that "the only kind of 'parent,' under § 406(a), whose presence in the home would provide adequate economic protection for a dependent child is one who is legally obligated to support him." 392 U.S. at 332.

Alabama asserted that two state governmental interests were advanced by the substitute father rule: the state's interest in discouraging meretricious sexual relationships,

and the state's interest in allocating its share of AFDC funds according to the needs of its citizens. As to the first interest, the Supreme Court allowed that states generally have broad discretion in regulating sexual behavior outside of marriage, but held after examining the legislative history of the Social Security Act that Congress did not intend section 406(a) to be a lever in the hands of state legislators to compel compliance with local standards of moral conduct. 392 U.S. at 320-27. As to the second interest, the Court granted that Alabama had the power to set the level of benefits and standard of need under its plan, but held that in determining need it must account for the actual resources of the child. 392 U.S. at 332.

In one sense, the *King* holding does not bear directly on the instant case. Unlike the Alabama substitute father regulation, the New York regulation does not presume to define "parent" artificially to deny eligibility to the family housing a lodger. The meaning of the term "parent" as it used in section 406(a) is therefore not directly at issue. The New York regulation merely determines the level of payment to the eligible family on the basis of the presence or absence of a lodger in the recipient household. This method of computing shelter allowance is permitted under the *King* v. *Smith* rationale if it is not designed to vindicate a moral interest unrelated to the need of the family, and if it realistically determines the level of need. As to the first point, it is clear that there is not the punitive aspect to the New York regulation that there was in the Alabama substitute father regulation. This is not a case of New York trying to impose "middle class morality" on the welfare recipient, using AFDC as an instrument of social control. This fact is illustrated by the Otey and Taylor cases, cases in which the shelter allowances were reduced because of the presence of persons other than

the mother's paramour in the recipient household. The appellees' claim that sections 352.30(d) and 352.31(a)(3)(iv) offend the principle in *King* v. *Smith* thus stands or falls on their assertion that the regulations create a conclusive presumption of lodger contribution to the AFDC unit's rental expense, and that this presumption does not account for the actual needs of the AFDC-eligible family.

Under the long-standing administrative interpretation of section 402(a)(7) of the Social Security Act, only real sources of income may be considered by the state in determining need. The most recent embodiment of that interpretation, second 233.90(a) of the Health, Education and Welfare regulations governing the content of state plans, clearly states that the presence of any individual except a person legally obliged to support the child "is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State." Any doubt remaining on the issue was removed by the Supreme Court's holding in *Lewis* v. *Martin,* 397 U.S. 552 (1970), that section 233.90(a) precluded California from attributing income to an AFDC-eligible child from a non-adopting stepfather who had no duty of support under state law.

Although we agree that federal law prohibits a conclusive presumption of support, we do not agree that the New York regulations here in question imply such a presumption. The regulations imply only that the lodger's presence evidences the recipient family's diminished need for housing space. Section 352.30(d) does not attribute a non-existent obligation of support to the lodger, nor does it deny the AFDC-recipient children or caretaker their share of the actual housing expenditures. Prorating housing costs between the recipient and non-recipient simply reflects the separability of the need of the AFDC-eligible family members from the needs of persons who have not demonstrated their eligibility for public assistance. In-

deed, if a section 352.20(d) lodger can separately demonstrate his eligibility for public aid, the AFDC shelter allowance is increased to include his share, a principle illustrated by the Taylor case. See note 3, supra.

Appellees have attempted to justify their position by incanting the words "conclusive presumption of contribution." But it is clear that the New York regulations are based on the fair inference from the presence of the lodger in the household that the AFDC-recipient family actually needs less space for its own use that it is paying rent for. Appellees do not dispute that in the event an eligible family chooses to live as lodgers in a portion of a non-eligible person's house, the state may pay only the eligible family's pro rata share of the total rent, regardless of contribution, without offending federal law: the recipient family would be due shelter allowance only for that portion of the house they were actually using. The outcome is no different when the AFDC family uses a portion of its own premises to house a non-eligible person, whether or not that person contributes to the rent.

Prorating housing expenses among recipients and non-recipients of public aid accounts for the economies of scale that are realized when individuals live in groups; per-individual housing costs decrease as the number of individuals living together increases. In the Hurley case, for example, Hurley, her three children, and her lodger can live at a lower per capita housing cost than can Hurley and her children alone. Thus, the New York scheme does not attribute a false duty of support or a false source of income, but rather accounts for the actual cost of housing to an AFDC-recipient family.[4]

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[4] In preparing for these appeals, the New York Department of Social Services addressed a letter to the Regional Attorney of the Social and Rehabilitation Service of the Department of Health, Education & Welfare containing a request for an opinion on the following question:

Appendix B.

The New York regulations have a more limited objective than those held invalid in *King* and *Lewis*. The objective of section 352.30(d) is to insure that all of the beneficiaries of an AFDC grant are entitled to enjoy it. Unlike the Alabama and California regulations, the New York regulations do not cut off all aid to families having non-eligible persons in their households. They merely prevent non-eligible persons from benefitting from free living space.[5] New York's interest in preventing non-ligible persons from sharing in AFDC benefits is coextnsive with the federal interest in allocating AFDC appropriations only to eligible persons. Section 402(a)(10) of the Social Security Act, 42 U.S.C. § 602(a)(10) (1970), states that aid must be furnished "with reasonable promptness to all eligible individuals," language necessarily implying that aid should not be furnished to non-eligible individuals.

Reversed and remanded.

"Is a state policy of prorating a shelter allowance so as to reflect the percentage of public assistance recipients residing in a household valid under 45 CFR 233.20?"

The response of the Regional Commissioner of the Department was available a short time after these appeals were argued:

"... HEW has permitted states to prorate shelter allowances to reflect the percentage of public assistance recipients in a household. Such a proration is not considered an assumption of income, but rather a recognition that per-individual costs decrease as the number of individuals living together increases."

[5] In *Battle* v. *Lavine*, —— App. Div. —— (2d Dep't April 22, 1974), the Appellate Division held that the regulation prorating shelter allowance violated 45 C.F.R. § 233.90. Solely on the authority of the district court's decision in *Hurley* v. *Van Lare*, it rejected the proposition that the purpose of the New York regulation is to prevent non-eligible persons from benefiting from shelter allowance payments. Since we reverse *Hurley* v. *Van Lare*, we do not give any weight to the Appellate Division's holding.

Appendix B.

OAKES, *Circuit Judge* (dissenting):

The majority decision today reverses two distinguished federal trial judges and reaches a conclusion quite contrary to that of an Appellate Division of the New York Supreme Court, and antithetical to decisions of the Supreme Court of New Jersey, and of federal district courts in Massachusetts, Indiana and Georgia.[1] It also disregards the mandates of Supreme Court decisions from *King* v. *Smith*, 392 U.S. 309 (1968), to *Shea* v. *Vialpando*, 42 U.S.L.W. 4559 (U.S. Apr. 23, 1974). As such, today's majority opinion stands nakedly—and thankfully—alone, for the majority permits a state to deprive the dependent children of a needy family of a portion of their allowances for shelter because some person—whether an unemployed adult child, a disabled (but ineligible) sister, or a male "friend"—resides in the same household. The result I think flies in the teeth of the federal law and Supreme Court decisions, disregards economic realities and is quite unjust to the needy children otherwise entitled to assistance.

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[1] *Battle* v. *Lavine*, —— App. Div. ——, —— N.Y.S.2d —— (2d Dep't Apr. 22, 1974). *Contrary to the majority's suggestion*, at note 5, the New York court's decision was not merely based *on the authority of Hurley* v. *Van Lare*. One would be surprised were a high court of the sovereign state of New York to determine *the purpose of a state regulation* "[s]olely on the authority of [a federal] court's decision." Majority opinion at note 5. Rather *Hurley* v. *Van Lare* was simply cited for the proposition that the federal district court had reached one of the same conclusions as the Appellate Division—that "notwithstanding the [State's] protestations that their concern is that ineligibles not receive a rental stipend, the inevitable result of the State regulation under attack is to reduce, perhaps drastically, the stipend for those who are eligible." —— App. Div. at ——, —— N.Y.S.2d at ——. Other shelter allowance cases contrary to the majority decision include *Hausman* v. *Department of Institutions and Agencies*, 64 N.J. 203, 314 A.2d 362 (1974). *See also Mothers and Childrens Rights Organization, Inc.* v. *Stanton*, 371 F.

Appendix B.

The majority today finds two challenged New York regulations in conformity with the federal statute, 42 U.S.C. § 602(a)(7),[1a] and regulation, 45 C.F.R. § 233.90(a)(1973).[2] The first challenged regulation, 18 NYCRR

Supp. 298 (N.D. Ind. 1973); *Owens* v. *Parham*, 350 F. Supp. 598 (N.D. Ga. 1972) (three-judge court); *Boucher* v. *Minter*, 349 F. Supp. 1240 (D. Mass. 1972) (three-judge court), all of which are unmentioned by the majority opinion.

[1a] 42 U.S.C. § 602 reads, in pertinent part:

(a) A State plan for aid and services to needy families with children must . . .

(7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same house as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income.

[2] 45 C.F.R. § 233.90 Factors specific to AFDC.

(a) *State plan requirement.* A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extend [sic] that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

Appendix B.

§ 352.31(a)(3)(iv),[3] is New York's administrative soft shoe around *King* v. *Smith, supra.* New York defines a man who lives with a woman to whom he is not married and for whom he does not assume financial responsibility as a "lodger." In *King,* Alabama had defined a man who engaged in the same conduct a "parent." In *King* the result of that definition was to disqualify the AFDC *child* from receiving any benefits; in the present case the result of New York's definition of the man as a "lodger" is also to disqualify the AFDC child, although only from a portion of his benefits. Thus by New York's cleverness in changing a "parent" to a "lodger," it has managed, with the aid of today's decision, to accomplish what a number of other states have not—the reduction in the AFDC's child's benefits on the basis of the mother's living arrangements. *See, e.g., Lewis* v. *Martin,* 397 U.S. 552 (1970); *King* v. *Smith, supra; Rosen* v. *Hursh,* 364 F.2d 731 (8th Cir. 1972); *Reyna* v. *Vowell,* 470 F.2d 494 (5th Cir. 1972); *Boucher* v. *Minter,* 349 F. Supp. 1240 (D. Mass. 1972) (three-judge court); *Owens* v. *Parham,* 350 F. Supp. 598 (N.D. Ga. 1972) (three-judge court); *Gaither* v. *Sterrett,* 346 F. Supp.

[3] 18 NYCRR § 352.31(a) . . .

(3) When a female applicant or recipient is living with a man to whom she is not married, other than on an occasional or transient basis, his available income and resources shall be applied in accordance with the following:

. . . (iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(d).

1095 (N.D. Ind.) (three-judge court), *aff'd,* 409 U.S. 1070 (1972). At least one state has been frustrated twice, *see X* v. *McCorkle,* 333 F. Supp. 1109 (D.N.J. 1970), *aff'd sub nom. Engleman* v. *Amos,* 404 U.S. 23 (1971); *Hausman* v. *Department of Institutions and Agencies,* 64 N.J. 203, 314 A.2d 362 (1974). And, interestingly, the majority, by not striking down this regulation, runs directly counter to its *own* assessment of what *King* stands for—"that Congress did not intend [AFDC] to be a lever in the hands of state legislators to compel compliance with local standards of moral conduct."

This determination may not be so harsh as it sounds, however, for it seems plain enough that the three-judge court should find this regulation unconstitutional. The definition of a "lodger" as a man who lives with a woman to whom he is not married, while not defining a woman who lives with a man as such, is so patently a violation of equal protection on the basis of sex, *see Frontiero* v. *Richardson,* 411 U.S. 677 (1973); *Reed* v. *Reed,* 404 U.S. 71 (1971), that, whether sex is regarded as a "suspect" classification or not, the State is unlikely to be able to find a justification for the classification here.

The other regulation under challenge here, 18 NYCRR § 352.30(d),[4] is the more significant—both because its cleverness makes it more insidious and because, even absent the other regulation defining "lodger," this regulation also permits the reduction of recipient children's benefits as a result of whom the mother allows to live in the house, the apartment or tenement as the case may be. This regulation provides that if a lodger pays $15 a month or more, that amount will be considered income to the recipient family.[5] If, however, the lodger pays nothing, or less than $15, then a pro rata share of the shelter allowance, including fuel for heating, will be deducted from the *family's* benefits.[6] This is the regulation which resulted in plaintiff Taylor and her six-year-old child receiving an eviction notice because a reduced shelter allowance made it impossible to meet the rent. Plaintiff Taylor's "lodger"? Her disabled sister. This is the regulation which requires plaintiff Otey to throw her unemployed, ineligible-for-welfare, 23-year old son out on the street, because if he lives

[4] 18 NYCRR § 352.30(d):

> A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance.

[5] This actual contribution, like all other income, will result in a reduction of the family's benefits under the theory that welfare will only provide that money necessary to bring a family up to its level of need. This section of the regulation is unchallenged and, in my view, comports entirely with the intent of the federal statute and regulations.

[6] Those on welfare are sure to learn quickly that they will maximize their benefits by *claiming* that they receive $15 a month from their lodger, resulting in only a $15 diminution of their shelter allowance. In this way they will lose only $15 of benefits, rather than a pro rata share, which normally would be more. Thus, in Hurley's case the pro rata reduction was $35, although she received no contribution from her male friend. In Taylor's case the pro rata reduction was $55, although she received no contribution from her sister. In Otey's case the pro rata reduction was $48.35 although she received no contribution from her son. One may wonder about the rationality of a system which deducts $55 from someone receiving no contribution, but only $15 from someone receiving a $15 contribution.

in the home their shelter allowance will not be sufficient to pay the rent, while if he moves out the State will pay the full amount.[7]

The majority concedes that if this regulation *conclusively presumed* the availability of income from the lodger and reduced the AFDC child's benefits on that basis, then the regulation would be unlawful under the HEW regulation. Rather than find such a presumption inherent in the regulation, however, the majority advances two independent bases or objectives of the regulation as compatible with the federal law and regulation. Each of them is in my view wholly lacking in sufficiency.

The first allowance "basis" for the regulation found by the majority is "the fair inference from the presence of the lodger in the household that the AFDC-recipient family actually needs less space for its own use than it is paying rent for." While "it is clear" to the majority that this inference is the basis of the regulation, this was not the basis claimed by the State either in the court below or in this court.[8] Rather this "basis" for the regulation lies in my colleagues' fertile imagination. If this case were here now upon an equal protection challenge, then the majority might properly try to find a reasonable basis for the classification. *Dandridge* v. *Williams*, 397 U.S. 471 (1970). But this is

[7] Compare this result with the federal purpose "to help maintain and strengthen family life," 42 U.S.C. § 601, and the federal requirement that states provide services" for the purpose of preserving . . . the family. . . ." 42 U.S.C. §§ 602(a)(13), 602(a)(14), 606(d). *See Shea* v. *Vialpando*, 42 U.S.L.W. 4559, 4560 (U.S. Apr. 23, 1974). *See also Rodriquez* v. *Vowell*, 472 F.2d 622, 626 (5th Cir)., *cert. denied*, 412 U.S. 944 (1973).

[8] It would indeed be hard to maintain that this is the basis for the rule, because as soon as the "lodger" moves out, the full shelter allowance is restored. If the presence of the lodger demonstrated excess space, as maintained by the majority, then his moving out would not be a reason to resume full shelter payments.

not an equal protection challenge. It is a challenge under a federal statute and regulation which through several years and many case of judicial scrutiny have taken on substantive requirements well beyond those of the Equal Protection Clause. Primary among those requirements is that *a child's resources are to be measured in actuality, not on the basis of a presumption. See, e.g., Shea* v. *Vialpando*, 42 U.S.L.W. 4559, 4562 (U.S. Apr. 23, 1974). The majority acknowledges the federal prohibition of a presumption of support. Support, however, is just one type of resource affecting a family's need; the amount of available living space is another. Yet in place of a presumption of support, the majority substitutes a *conclusive presumption that whenever there is a "lodger" the family has more space than it needs.* As such, it may well be contrary to fact: the older brother may be sharing a single bed with a younger one; the disabled sister may be sleeping on the couch.

Labeling the New York regulation a "fair inference" does not change its conclusive nature where a showing contrary to the inference will not affect the shelter allowance reduction; here the only fact considered by the State in the fair hearing is the presence or absence of a lodger, not the amount of space in the apartment. If the regulation provided only for a rebuttable presumption, whether of payments by the lodger or of excess space, there might well be a different question.[9] Thus, the majority, in upholding the

[9] In *Mothers and Childrens Rights Organization, Inc.* v. *Stanton*, —— F. Supp. ——, Civ. No. 72 F 69 (N.D. Ind. 1973), the court found regulations almost identical to New York State's in conflict with the federal law and regulations *as applied*. The court found that making a presumption of support, if rebuttable, was lawful, but if the presumption was irrebuttable in practice, then it was unlawful. *Accord, Hausman* v. *Department of Institutions and Agencies*, 64 N.J. 203, 314 A.2d 342 (1974). In *Owens* v. *Parham*, 350 F. Supp. 598 (M.D. Ga. 1972) (three-judge court), the court also found a presumption in analytically identical regulations,

regulation on this basis, creates a conclusive presumption regarding the child's needs which has the effect of reducing the AFDC child's benefits. This directly contravenes the HEW regulation which provides:

> [A state plan must] [p]rovide that the determination of need and amount of assistance for all applicants and recipients will be made on an *objective and equitable basis* . . . .

45 C.F.R. § 233.20(a)(1) (emphasis added). The majority's conclusive presumption of the child's need, or lack of it, also violates what seems to me the clear import of *Shea* v. *Vialpando, supra; King* v. *Smith, supra; Lewis* v. *Martin, supra;* and HEW regulation, 45 C.F.R. § 233.90(a), that a family's resources (be they income or amount of living space) be determined by what it *actually* has or receives, not by presumptions or inferences.[10] If such a

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upheld the regulations on their face, but found them *unconstitutional* as applied, because recipients whose shelter allowances were reduced as a result of non-eligibles residing in the household were not given an opportunity to rebut the presumption. The Supreme Court in *Shea* v. *Vialpando,* 42 U.S.L.W. at 4564, suggested a similar solution in finding a uniform allowance for work-related expenses unlawful under the Act. The Court said that if there were provided an opportunity for individualized consideration where the allowance was not sufficient, then the allowance would not be unlawful.

[10] In *Shea* v. *Vialpando, supra,* the Court declared a Colorado uniform allowance for work-related expenses incompatible with the Social Security Act, saying:

> From the inception of the Act, Congress has sought to ensure that AFDC assistance is provided only to needy families, and that the amount of assistance actually paid is based on the amount needed in the *individual* case after other income and resources are considered.

42 U.S.L.W. at 4562 (emphasis original).

presumption be the basis for the New York regulation,[11] it is in violation of federal law, and the regulation must fall.[12]

An "objective" of the New York regulation, according to the majority, "is to insure that all of the beneficiaries of an AFDC grant are entitled to enjoy it." Clearly the State is not required, or for that matter allowed, to extend AFDC benefits to ineligible persons. The question, however, is whether this regulation serves to keep AFDC benefits from the ineligible, or whether instead it unlawfully withholds benefits from those rightfully entitled to

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[11] New York's regulations requiring initial and continuing investigations into need and eligibility demonstrate both its general adherence to *the rule of determining actual, individual needs and resources* and the lack of necessity for a presumption regarding excess iving space. The New York regulations deal in some detail with the investigations to be made both initially 18 NYCRR §§ 351.1-.6, and on a continuing basis, 18 NYCRR §§ 351.20-.21. The *actual* resources are investigated in depth. 18 NYCRR § 351.2(e). Among the facts to be determined by documents, personal observation, personal and collateral interviews and other means are the residence and family composition. Each member of the household is investigated as to age, relationship to other members, marital status, employment, and the like. 18 NYCRR § 351.2(c). The place of residence must itself be specifically investigated and approved. 18 NYCRR § 351.3. Every six months all variable factors of need must be reconsidered, re-evaluated, and verified. 18 NYCRR § 351.21 (b)(2). In short, it is absurd to create an administrative presumption concerning resources of income or space, when the actual information is on file and subject to immediate verification. Let it be remembered that New York justified its "home visits" in *Wyman* v. *James,* 400 U.S. 309 (1971), by its claimed need to gather this very type of information.

[12] This conclusive presumption, which the majority styles a fair inference, is in any case in violation of due process. *See Owens* v. *Parham, supra. See also United States Department of Agriculture* v. *Murry,* 413 U.S. 508 (1973); *Vlandis* v. *Kline,* 412 U.S. 441 (1973); *Stanley* v. *Illinois,* 405 U.S. 645 (1972); *Heiner* v. *Donnan,* 285 U.S. 312 (1932).

it—dependent children in need and their responsible families. The fallacy underlying the majority's view, and the argument of the State on this issue, is that the lodger is not a "beneficiary" of the AFDC grant either in law or fact. The lodger is rather the beneficiary of the AFDC family's generosity, and more likely that of the AFDC children's mother. If a lodger is not present in the household, the family receives a rent allowance determined by the State to be proper for the family. If a lodger then is invited into the household, he would not receive any benefit from the AFDC grant, the entire amount of which the family is entitled to without him; he is rather a recipient of that charity which the family wishes to extend *from its own resources.*[13] He is there at the family's forbearance

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[13] To carry out the majority's analysis, when the welfare mother puts a dollar bill in the collection plate on Sunday, the church is "sharing in AFDC benefits," and presumably the majority would uphold a state regulation which provided for withholding from the AFDC grant a sum equal to any donations to charity. The supposed justification remains the same—the State provides AFDC grants for the support of the dependent child and not for the benefit of ineligibles, and the fallacy is the same. Rather the State provides the family with what it determines to be the necessary resources, but then the resources belong to the family to utilize as it best sees fit. Absent this element of choice a welfare state would be a police state.

If the State believes that the resources are being misused to the detriment of the child, it has a vast battery of provisions which it may use to protect the child. Initially and primarily there are counseling services for the family. 18 NYCRR §§ 386.1-.10. This may range from simple caseworker counseling to specialized psychiatric help. Where a recipient has demonstrated an inability to handle the cash resources provided, restricted payments may be made rather than the normal unrestricted payments. Soc. Services Law § 350-a; 18 NYCCR § 381.3(a). For instance, if the head of the household wastes money so that rent payments cannot be met, the State may undertake to pay the shelter allowance directly to the landlord. Soc. Services Law § 143-b; 18 NYCCR § 381.3(c). The overall payments may be made to a person other than the head of household or to an agency on behalf of the eligible child. 18 NYCCR § 381.8. A homemaker may be provided in the house for the family. 18 NYCCR § 387.2. Intensive family casework services are available. 18 NYCRR §§ 456.1-.7. In extreme cases the chidren may be removed from the home and placed in foster care. Soc. Services Law § 358-a; 18 NYCRR § 450.3. And, of course, the whole gamut of procedures relating to neglected children is available to the State. Soc. Services Law §§ 374, 397, 398; Penal Law §§ 260.05, .10; Family Court Act § 1011-74.

or pleasure and he has no right to remain. He receives nothing from the State, and when the family's shelter allowance is reduced, nothing is taken from him. He continues to live in the household at the pleasure of the family.

Clearly what the State is doing is not keeping welfare funds from the ineligible by this regulation.[14] Rather it seeks to punish the welfare family for using its own resources in a manner of which the Commissioner disapproves in advance in every case. Whether the Commissioner is attempting to enforce the "middle class morality" mentioned by the majority, or just trying to save money any way he can, the federal statute and regulations, and the unanimous case law forbid the State from enforcing its predilections *which are irrelevant to the welfare of the child*[15] by depriving the eligible child of its needs. *See, e.g., Carleson* v. *Remillard,* 406 U.S. 598 (1972); *Townsend* v. *Swank,* 404 U.S. 282 (1971); *Lewis* v. *Martin, supra; King* v. *Smith, supra; Doe* v. *Ellis,* 350 F. Supp.

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[14] If the lodger were receiving welfare funds for which he was ineligible, he could be prosecuted for welfare fraud. Soc. Services Law § 145.

[15] Neither the State nor the majority has asserted that the regulation in question in any way safeguards the welfare of the eligible child. Nor does it appear how by reducing the child's benefits, which in one of the cases before us resulted in a notice of eviction, the child's welfare would be enhanced.

375 (D.S.C. 1972) (three-judge court); *Saddler* v. *Winstead,* 332 F. Supp. 130 (N.D. Miss. 1971); *Doe* v. *Schmidt,* 330 F. Supp. 159 (E.D. Wis. 1971) (three-judge court); *Doe* v. *Shapiro,* 302 F. Supp. 761 (D. Conn. 1969) (three-judge court), *appeal dismissed,* 396 U.S. 488 (1970). And that is exactly what is being done here.

To repeat, to reduce the shelter allowance of an AFDC family by virtue of the presence in the home of a non-paying lodger does not deprive the lodger of any benefits —only the family which allows him to stay can do that— but rather deprives the needy family, and especially the needy child who is the object of the AFDC program, of them.

If the State believes that the non-paying lodger should not get a "free ride," the State may legislate or proceed against the lodger, but should it be permitted to deprive *the needy child?* The State may attempt to obtain reimbursement from the lodger for the use of the family's resources,[16] but should it be able to punish the child because the head-of-household does not require the lodger to pay for his shelter? *Cf. Doe* v. *Schmidt, supra; Doe* v. *Shapiro, supra.*

There are only two other points made by the majority requiring passing mention. First, there is a suggestion that an "economy of scale" operates in the sense that the per capita housing cost decreases when there is a lodger. It is nonsense, however, to say that the cost of housing to the recipient family decreases when there is a *non-paying* lodger. Moreover, an economy of scale does not reduce the *total* cost of anything, and yet here, where the recipient family is legally and factually responsible for the total

[16] The State already requires the applicant for welfare to assign certain assets and to utilize all resources for the production of income. *See* 18 NYCRR §§ 352.15(d), 352.23, 352.25, 352.27, 352.28.

rent bill, the State is providing a *smaller* total allowance although the lodger contributes nothing. An economy of scale would operate only if the lodger were presumed to pay his pro rata share. But such a presumption would be clearly unlawful, as the majority concedes and 45 C.F.R. § 233.90(a) provides. The presence of a lodger is, finally, irrelevant to the rent the family pays. A certain rent is due and payable; if the State reduces the rent allowance, the difference will either be made up out of food budget— literally out of the needy child's mouth—or it will not be made up, resulting in a notice of eviction. Plaintiff Taylor with her eviction notice would surely laugh, although perhaps a little bitterly, at the majority's suggestion that by housing her destitute and disabled sister the family's "actual cost of housing" was reduced.

Finally, in a footnote, the majority quotes from a letter from HEW in response to questions from the State. The suggestion of the footnote is that HEW has taken a position on the question before us. To the contrary, however, in that same letter HEW acknowledged that it approves both plans like new York's and those which grant full shelter allowance despite the presence of non-recipients in the household. In other words, HEW here, just as it did prior to *King* v. *Smith, supra,* has not resisted a state's attempt to evade its own regulations and the federal statutes. *See also Shea* v. *Vialpando,* 42 U.S.L.W. at 4563 n. 11.

I would affirm the judgments below, because, as Judge Bauman said,

> the inevitable result of these regulations is to reduce, perhaps drastically, the stipend for those who are eligible. . . . This devastating reduction means in practice that rental payments must be met out of that portion of the welfare stipend allotted for food and clothing.

Hurley v. *Van Lare,* 365 F. Supp. 186, 195 (S.D.N.Y. 1973).

Because the regulation denies the eligible child his basic needs for no reason related to the purpose of the federal statute, it violates that statute and the implementing regulations.[17]

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[17] The majority's decision in its own words is premised upon what the majority concludes the *New York regulations* to "imply" or to be "based on," or their "objective." The Appellate Division in *Battle* v. *Lavine, supra,* the highest state court to have spoken on the issue, has explicitly rejected the interpretation of the majority here. Whether this court should be bound by the interpretation of state law made by *Battle* is a question not argued or briefed to us as *Battle* was decided after argument before this court. Nevertheless, it is clear that the majority decision, based as it is on an interpretation of state law, does not preclude New York courts from reaching an opposite conclusion, as the *Battle* court did, as to the conformity of the state regulations with the federal statute and regulations.

APPENDIX C

Opinion of the Single District Judge in *Hurley* v. *Van Lare.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 3423

ROSE HURLEY, individually and on behalf of her minor dependent children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Plaintiffs,

against

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York,

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York,

LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Defendants.

APPEARANCES

Legal Aid Society of Westchester County (Martin A. Schwartz, Jerold S. Slate, Lawrence S. Kahn, of Counsel) for plaintiffs and intervenor D'Alessio.

Legal Aid Bureau of Buffalo, Ins. (Michael A. O'Connor, Margaret Dodd, of counsel) for intervenor Clark.

Louis J. Lefkowitz, Attorney General, State of New York (Judith A. Gordon, Gene B. Mechanic, of counsel) for defendants Van Lare and Lavine.

John J. S. Mead, County Attorney, Westchester County (Richard W. McAtamney, of counsel) for defendant Kurtis.

BAUMAN, D. J.

Before the court is yet another action challenging the manner in which the State of New York allocates its welfare funds. Plaintiff and her three minor children receive public assistance pursuant to the Aid to Families with Dependent Children (AFDC) program. The action is brought on their behalf, and on behalf of all others similarly situated, to enjoin the enforcement of 18 N.Y.C.R.R. § 352.31 (a)(3)(iv)[1] and 18 N.Y.C.R.R. § 352.30(c) and (d)[2] and to secure retroactive public assistance payments of which she claims to have been unlawfully deprived.

The plaintiff has moved for class determination pursuant to Rule 23 of the Federal Rules. She also seeks summary judgment pursuant to Rule 56, and thereby, a permanent injunction against the enforcement of the attacked state regulations as well as retroactive welfare payments. Plaintiff argues that these regulations are violative of the due process and equal protection clauses of the Fourteenth Amendment and repugnant to the rights of privacy and freedom of association secured by the First, Ninth, and Fourteenth Amendments. She also contends that they are violative of the Supremacy Clause (Article VI) in that they conflict with the provisions of subchapter IV of the Social Security Act, 42 U.S.C. § 601 et seq. and the regulations promulgated thereunder. The defendants in turn have moved to dismiss the action pursuant to Rules 12(b)1 and

12(b)6 of the Federal Rules on the grounds that this court lacks subject matter jurisdiction and that the complaint fails to state a claim upon which relief can be granted. In addition, Phyllis D'Alessio and Loretta Clark, both mothers receiving aid under the AFDC program, seek to intervene pursuant to Rule 24(b)(2). The defendants oppose their intervention.

I.

A brief exposition of Mrs. Hurley's situation may help illuminate the difficulty in which she and others in her purported class find themselves.[3]

Mrs. Hurley has been living apart from her husband since 1967 and claims not to have seen or heard from him since that time. From November, 1970 through February, 1971 a male who contributed nothing toward her maintenance or that of her three children lived with her. Her rent during that period was $150 per month. Upon learning of the presence of a male lodger, the Westchester County Department of Social Services, without explanation as to how the figure was reached, deducted $35 per month for the four months from plaintiff's recurring grant.

On November 12, 1970 plaintiff requested a State Fair Hearing which was held on March 22, 1971 in White Plains, New York. In a decision rendered September 20, 1971, Barry Van Lare, the Acting Commissioner of the Department of Social Services, upheld the grant reduction but ruled that the Westchester Department should have deducted $30 rather than $35 from her stipend.[4]

Plaintiff claims that she still wishes to associate and reside with this male friend, but is afraid to do so because of the anticipated reduction in her public assistance grant.

II.

I shall first consider plaintiff's motion that this be designated a class action pursuant to Rule 23(a)[5] and Rule

23(b)2[6] of the Federal Rules. The proposed class would consist of "all residents of the State of New York who are or were receiving public assistance, who have had their grants reduced, terminated, suspended or denied, or who are threatened with reduction, termination, suspension or denial, solely because of the enforcement of 18 N.Y.C. R.R. § 352.31(a)(3)(iv) and § 352.30(c) and (d)."

It would appear that all of the requirements in the above cited rules have been met and that this may proceed as a class action. Plaintiff's efforts to demonstrate satisfaction of the numerosity requirement, Rule 23(a)1, have been thwarted in part by the state's failure to compile any statewide statistics on the number of recipients whose grants have been reduced because of the presence of lodgers.[7] However, the defendants did furnish statistics compiled by a research analyst in the State Department of Social Services indicating that as of November 1, 1972, there were 477 such cases in New York City. That figure alone would render the class so numerous that joinder would be impracticable, and it may reasonably be assumed that the total number in the state is far larger still.

Plaintiff's claims are typical and there can be no dispute that the questions of law or fact are common to the class. It has been frequently noted in similar cases that the state's promulgation of an unconstitutional regulation and/or its failure to comply with regulations of the Department of Health, Education, & Welfare affects all welfare recipients in the same manner. *Seritella* v. *Engelman,* 339 F.Supp. 738 (D.N.J. 1972); *Almenares* v. *Wyman,* 334 F.Supp. 512 (S.D.N.Y. 1971), affd., 453 F.2d 1075 (2nd Cir. 1971). For the purpose of determining the constitutionality of the challenge regulations, it does not matter that plaintiff and some members of the class have received Fair Hearings and others have not. The exhaustion of state administrative remedies is not a prerequisite to the maintenance of an action under 42 U.S.C. § 1983. *Sostre* v. *McGinnis,* 442

F.2d 178 (2nd Cir. 1971); *Carter* v. *Stanton,* 405 U.S. 669 (1972); *Damico* v. *California,* 389 U.S. 416 (1967). Accordingly, even where some of the named plaintiffs have exhausted their administrative remedies, the class may nevertheless include others who have not. *Doe* v. *Lavine,* 347 F.Supp. 357 (S.D.N.Y. 1972); *Broussard* v. *Schlumberger Well Services,* 315 F.Supp. 506 (S.D.Tex. 1970); *Miller* v. *International Paper Co.,* 408 F.2d 283 (5th Cir. 1969). Hence such factual distinctions among members of the class have little bearing on the resolution of the central question presented by this action, namely, the constitutionality of the New York regulations.

I have no doubt that the representative party will fairly and adequately protect the interests of the class. The Legal Aid Society of Westchester County, which represents both Mrs. Hurley and Mrs. D'Alessio, one of the intervenors, has demonstrated a high standard of advocacy in both its written and oral presentations before this court, and I am certain that it will continue to do so.

Finally, it is also clear that the instant action is precisely of the type contemplated by Rule 23(b)2. The Advisory Committee Notes to Rule 23 with reference to this subsection point up its applicability:

> "This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class and final relief of an injunctive nature, setting the legality of the behavior with respect to the class as a whole, is appropriate . . . Action or inaction is directed to a class within the meaning of this subsection even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.
>
> Illustrative are various actions in the civil-rights field where a party is charged with discriminating un-

lawfully against a class, usually one whose members are incapable of specific enumeration." (Citations omitted).

Examples of cases challenging state welfare laws in which class action status has been granted are legion. *Almenares* v. *Wyman, supra; Gaddis* v. *Wyman,* 304 F.Supp. 717 (S.D.N.Y. 1969); *James* v. *Goldberg,* 302 F.Supp. 478 (S.D.N.Y. 1969); *Doe* v. *Shapiro,* 302 F.Supp. 761 (D.Conn. 1969). The motion to designate the instant case a class action is therefore granted.

III.

I am also satisfied that this court has jurisdiction to entertain this action pursuant to 42 U.S.C. § 1983 and its jurisdictional complement, 28 U.S.C. § 1343(3). It is now well settled that jurisdiction exists under § 1343(3) only if the complaint presents a substantial constitutional question. *Almenares* v. *Wyman,* 453 F.2d 1075, 1082 (2nd Cir. 1971); *Merriweather* v. *Burson,* 439 F.2d 1092 (5th Cir. 1971). I therefore intend to review the plaintiff's constitutional arguments. The survey shall be brief because, as shall appear more fully below, it appears that the question presented by this case can be resolved on statutory grounds alone. I therefore need consider the substantiality, but not the substance of the constitutional claims.

Plaintiff makes four separate constitutional arguments. First, she urges that the regulations, by discouraging the presence of a male lodger, exert a chilling effect on her right to free association secured by the First and Fourteenth Amendments. See generally, *N.A.A.C.P.* v. *Alabama ex rel. Patterson,* 357 U.S. 449 (1958); *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960); *Gibson* v. *Florida Legislative Investigation Committee,* 372 U.S. 539 (1963). Second, she argues that they violate her right of privacy and

right to freedom from governmental intrusion into the home. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Stanley* v. *Georgia,* 394 U.S. 557 (1969); *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972). Third, plaintiff contends that the assumption implicit in the challenged regulations that a lodger will contribute his *pro rata* share of shelter costs constitutes a conclusive presumption in violation of the Due Process clause of the Fourteenth Amendment. *Carrington* v. *Rash,* 380 U.S. 89 (1965); *Stanley* v. *Illinois,* 405 U.S. 645 (1972); *Vlandis* v. *Kline,* —— U.S. —— (June 11, 1973); *United States Department of Agriculture* v. *Murry,* —— U.S. —— (June 25, 1973). Her final argument is that the regulations violate the equal protection clause of the Fourteenth Amendment by discriminating arbitrarily between two classes of equally needy families: those without a lodger, who receive a full welfare stipend, and those with whom a lodger resides, and whose stipend is accordingly reduced. See *Dandridge* v. *Williams,* 397 U.S. 471 (1970); *Jefferson* v. *Hackney,* 406 U.S. 435 (1972).

Without implying any judgment on the merits of the other three contentions,[8] I find that at least plaintiff's due process argument raises a substantial constitutional question. The Supreme Court has long held that "a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." *Heiner* v. *Donnan,* 285 U.S. 312 (1932). To cite one recent example, the Court in *Stanley* v. *Illinois,* supra, found unconstitutional an Illinois law which made illegitimate children the wards of the state upon the death of their mothers and which consequently presumed unmarried fathers to be unfit to raise such children. It concluded that, as a matter of due process, an unmarried father was entitled to a hearing on his fitness as a parent before being deprived of his children. The Court observed that Illinois "insists on presuming rather than proving Stanley's

unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing . . ." 405 U.S. at 658.

In several recent cases courts have concluded that statutes similar to those at issue here created conclusive presumptions incapable of being contravened by a factual showing. In *Boucher* v. *Minter,* 349 F.Supp. 1240 (D.Mass. 1972), a three judge court struck down a provision of the Massachusetts AFDC program which reduced the shelter allowance to needy children upon the remarriage of their mother. The court held, inter alia, "[t]he irrebuttable presumption underlying the defendants' policy, namely, that after the mother's remarriage the children in the AFDC family do not need a shelter allowance and that household expenses will be paid by the stepfather is unrealistic and arbitrary." See also *Jenkins* v. *Georges,* 312 F. Supp. 289 (W.D.Pa. 1969); *Owens* v. *Parham,* 350 F.Supp. 598 (N.D. Ga. 1972); *Rosen* v. *Hursh,* 464 F.2d 731 (8th Cir. 1972).

Because 18 N.Y.C.R.R. § 352.31(a)(3)(iv) and §§ 352.30(c) and (d) automatically prorate a family's shelter allowance upon the presence of a male, I conclude that plaintiff's contention that a conclusive presumption is thereby created in violation of the Due Process Clause presents a substantial constitutional question and is a sufficient predicate for jurisdiction under 28 U.S.C. § 1343(3). I wish to emphasize that I do not pass on the substance of this question, both because the issue can be resolved on narrower ground and because it would be improper for a single judge to do so. I find only that the plaintiff has adequately refuted defendants' contention that the constitutional arguments presented here are frivolous or a mere pretext for placing the statutory arguments before this court.

III.

Before turning to plaintiff's contention that the challenged New York regulations are inconsistent with regulations promulgated under the Social Security Act, two observations are in order. First, it is now established that a suit to enjoin the enforcement of a state statute on the ground of its asserted repugnancy to a federal statute does not require the convening of a three judge court. *Swift and Company* v. *Wickham,* 382 U.S. 112 (1965); *Ex parte Buder,* 271 U.S. 461 (1926); *Ex parte Bransford,* 310 U.S. 354 (1940); *Case* v. *Bowles,* 327 U.S. 92 (1946). Second, where a court is presented with both constitutional and statutory claims, it is obliged to consider first the statutory claims. *Rosado* v. *Wyman,* 397 U.S. 397 (1970). I find myself in agreement with Judge Gurfein that "the most appropriate course for the district judge is to first face the statutory claim alone, since on it a three judge court is not required and since a three-judge court, if convened, would have to face it first." *Doe* v. *Lavine,* 347 F.Supp. 357 at 359-360 (S.D.N.Y. 1972). See also *Doe* v. *Gillman,* 347 F.Supp. 483 (N.D. Iowa 1972); *Saddler* v. *Winstead,* 327 F.Supp. 568 (N.D. Miss. 1971); *Connecticut Union of Welfare Employees* v. *White,* 55 F.R.D. 481 (D. Conn. 1972).

The AFDC program, 42 U.S.C. § 601 et seq., is one of three major categorical public assistance programs established by the Social Security Act of 1935. Its purpose is the encouragement of "the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services" to such children. 42 U.S.C. § 601. The dependent child is defined, at 42 U.S.C. § 606(a), as one "who has been deprived of parental support or care by reason of the death, continued absence from the home or physical or mental incapacity of a parent."

§ 606(a) was first carefully scrutinized by the Supreme Court in *King* v. *Smith*, 392 U.S. 309 (1968). At issue there was an Alabama regulation denying AFDC assistance to the children of any mother (1) who lived with a man; (2) who was visited frequently by a man "for the purpose of cohabiting"; or (3) who cohabited with a man even outside her children's home. Under the Alabama scheme it was irrelevant whether the man was legally obligated to support the children, and equally irrelevant whether he did in fact make any contribution toward their support. The State of Alabama argued before the Court that its regulation simply further refined the definition of "absent parent" under § 606(a); it further contended that its regulation significally reduced the welfare caseload, discouraged sexual intercourse, and put "informal" families on the same footing as other families. The Court rejected all of these contentions. It found it "inconceivable . . . that Alabama is free to discourage immorality and illegitimacy by the device of absolute disqualification of needy children." It further concluded that "Congress intended the term 'parent' in . . . 42 U.S.C. § 606(a) to include only those persons with a legal duty of support." The Court there struck down Alabama's regulation because it defined "parent" in a manner inconsistent with the federal statute.

The Court's exegesis of § 606(a) in *King* v. *Smith* was codified in 45 C.F.R. § 203.1.[10] That provision defined "parent" in accordance with the Court's interpretation and further provided that in determining a child's financial eligibility, a State could consider "only such income as is actually available for current use on a regular basis." In *Lewis* v. *Martin*, 397 U.S. 552 (1970), the Court had occasion to consider these new regulations, and that decision has a readily apparent relevance for the instant case. That case presented a challenge to a California law providing that welfare payments to children who lived with their

mother and stepfather "or an adult male person assuming the role of spouse" (MARS) shall be computed after consideration is given to the income of the stepfather or MARS. The Court noted (without explicitly adverting to the Due Process Clause of the Fourteenth Amendment) that this statute conclusively presumed that a child's needs were reduced by the income available from the man in the house whether or not such income was used to meet these needs. It upheld 45 C.F.R. § 203.1 as a reasonable exercise of HEW's administrative judgment and held that "[i]n the absence of proof of actual contribution, California may not consider the child's 'resources' to include either the income of a non-adopting stepfather who is not legally obligated to support the child as is a natural parent, or the income of a MARS—whatever the nature of his obligation to support." 397 U.S. at 559-560. The *Lewis* case has frequently been invoked by lower federal courts to invalidate state statutes which reduce AFDC grants to reflect the support supposedly provided by a stepfather or "man in the house." *Rosen* v. *Hursh*, 464 F.2d 731 (8th Cir. 1972); *Gilliard* v. *Craig*, 331 F.Supp. 587 (W.D.N.C. 1971), affd., 409 U.S. 807 (1972); *Gaither* v. *Sterret*, 346 F.Supp. 1095 (N.D.Ind. 1972), affd., 409 U.S. 1070 (1972). See also, *Reyna* v. *Vowell*, 470 F.2d 494 (5th Cir. 1972); *Solman* v. *Shapiro*, 300 F.Supp. 409 (D.Conn. 1969), affd. 396 U.S. 5 (1969).

In the case at bar plaintiff argues that 18 N.Y.C.R.R. § 351(a)(3)(iv) and § 352.30(c) and (d) are inconsistent with 45 C.F.R. § 233.90. She claims that these statutes, by effecting a *pro rata* reduction in the rental stipend because of the presence of a lodger, conclusively presume that the lodger is contributing to the family's income, whether or not he can or does make such a contribution. Indeed, the hearing examiner's decision specifically included the following finding: "The record establishes that the man residing with appellant [Mrs. Hurley] was not willing to

assume responsibility for the appellant or her children of which he is not the acknowledged or adjudicated father. In addition, no contribution is made by the lodger to the appellant." Plaintiff argues that the state statutes which effect a reduction in the rental stipend in disregard of such circumstances violate the policies enunciated in the *King* and *Lewis* decisions and embodied in 45 C.F.R. § 233.90.

Defendants, unable to distinguish those cases convincingly, offer but one argument in rebuttal. They contend that the only purpose of the challenged statutes is to prevent the allocation of AFDC funds to non-eligible persons. The regulations "merely pro rate the rent among the eligible persons and compute the shelter allowance accordingly, leaving the lodger and non eligible to pay his own way."[11] It would be unfair, the defendants imply, to permit a male lodger, who need not have qualified for public assistance, to share in the family's rental stipend. In order to prevent state subsidy of an ineligible recipient, the argument continues, the stipend must simply be reduced by the lodger's proportionate share.

I find the defendants' argument utterly unpersuasive and hold that the challenged regulations are inconsistent with 45 C.F.R. § 233.90. Despite the defendants' professed concern that ineligibles not receive a rental stipend, the inevitable result of these regulations is to reduce, perhaps drastically, the stipend for those who are eligible. In the case of a mother with one child, for example, the presence of a non-contributing male lodger would reduce the rental stipend by 33⅓%. This devastating reduction means in practice that rental payments must be met out of that portion of the welfare stipend allotted for food and clothing.

The regulations thus conflict directly with § 233.90, a portion of which states: "[u]nder this requirement, the inclusion in the family, or the presence in the home, of a

'substitute parent', or 'man in the house', or any individual other than that described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the state." Despite the defendants' protestations to the contrary, a *pro rata* reduction does indeed assume that the male lodger will pay his own way, whether or not he actually does. That is precisely the assumption found impermissible in *King* and *Lewis*.

It should also be noted that the regulations here under scrutiny are in one sense far cruder than were those at issue in *Lewis* v. *Martin, supra*. The California statutes at least took into account the income of the stepfather or MARS in computing the stipend payable to the family. The New York regulations reduce the rental stipend *regardless* of the lodger's income. Hence children who could qualify for a full stipend under the California plan (i.e., if the MARS in fact had no income) would have their rental stipend reduced under the New York scheme. The Supreme Court found the California regulations not calibrated carefully enough to consider income actually available to the child. These New York statutes, I find, are even less sensitive instruments.

This is not the first attempt by a state to reduce a shelter allowance on the theory that the cohabitation of eligibles and non-eligibles makes the state responsible for only a proportionate share of the rent. In *Boucher* v. *Minter*, noted at pages 8-9, supra, the Massachusetts statute operated similarly. The court there perceptively identified the fallacy in the reasoning of the statute:

> "Although she has become a member of her new husband's family, the mother remains the head of a family, distinct for purposes of AFDC, comprised of herself and her children and is no less logical a conduit for shelter payments for the children if they in fact

remain in need. That family unit remains unchanged since the stepfather does not join it in law; and if he does not join it in fact, by economic participation in its expenses, there is no basis in law or fact for an irrebuttable presumption that the shelter needs of the children have not continued despite the remarriage."

That flaw inheres in the New York regulations as well. See also, *Jenkins* v. *Georges,* 312 F. Supp. 289 (W.D.Pa. 1969); *Owens* v. *Parham,* 350 F. Supp. 598 (N.D.Ga. 1972).

In conclusion, then, I find that 18 N.Y.C.R.R. § 352.31(a)(3)(iv) and § 352.30(c)(d) are inconsistent with 45 C.F.R. § 233.90 and thus violative of the Supremacy Clause of the Constitution. Accordingly, an appropriate injunction shall issue against their enforcement.

V.

Two matters only remain for resolution. The first is the motion by Phyliss D'Alessio and Loretta Clark to intervene pursuant to Rule 24(b)2 of the Federal Rules.[13] Little would be gained by setting forth the proposed intervenors' backgrounds, for they are in all relevant details similar to that of Mrs. Hurley. Both are mothers receiving AFDC payments who have lost contact with the fathers of their children, and both have lived or are now living with men with whom they wish to reside on a permanent basis. Mrs. Clark has already received a Fair Hearing and suffered a *pro rata* reduction in her stipend. Mrs. D'Alessio has merely been threatened with a reduction.

A motion under Rule 24(b)2 is addressed to the discretion of the district court, *Lipsett* v. *United States,* 37 F.R.D. 549 (S.D.N.Y. 1965), appeal dismissed, 359 F.2d 956 (2nd Cir. 1966), and we are continually reminded that the rule should be liberally construed. *Peterson* v. *United States,* 41 F.R.D. 131 (D.Minn. 1966). However, I believe that

the rule should be construed in accordance with its underlying purpose, which is the prevention of a multiplicity of lawsuits involving common questions of law or fact. *Reich* v. *Webb,* 336 F.2d 153 (9th Cir. 1964), cert. denied, 380 U.S. 915 (1965). That purpose is already satisfied where, as here, the proposed intervenors fall within a class action designation. Consequently, the liberality with which the rule is customarily construed must give way to considerations of judicial economy and the avoidance of the confusion caused by multiple claimants. I have therefore concluded that where a suit has been designated a class action, admitting intervenors *who raise no new issues* and who fall within the class merely clutters the action unnecessarily.[13] See *Allen Calculators, Inc.* v. *National Cash Register Co.,* 322 U.S. 137 (1944). I understand Rule 23(d) at least to suggest that to intervene in a class action, applicants must show more than mere identity of questions of fact and law. Were that provision construed otherwise, it would mean that any member of the class, *ipso facto,* has a right to intervene and litigate the action fully. Such a construction would render class actions just as unmanageable as some are wont to fear them.[14]

I have concluded that the proposed intervenors here have not made a showing sufficient to justify their intervention; they have done nothing more than demonstrate factual and legal claims in common with the class. There is no danger that the case will become moot as to the named plaintiff, a circumstance which has been found to justify intervention. *Gaddis* v. *Wyman,* 304 F.Supp. 713 (S.D.N.Y. 1969). Nor is there any contention that the proposed intervenors' interests will be prejudiced or impaired by inadequate representation on the part of the named plaintiff. *Rolle* v. *New York City Housing Authority,* 294 F.Supp. 574 (S.D.N.Y. 1969); *Gabriel* v. *Standard Fruit & S.S. Co.,* 448 F.2d 724 (5th Cir. 1971). There was but one factor weigh-

ing in favor of their intervention. Both Mrs. Clark and Mrs. D'Alessio, because they were confronted with the imminent loss of welfare benefits, sought preliminary injunctions. Mrs. Hurley, who had formerly suffered a reduction but was now receiving her full stipend, did not. At oral argument, however, the representative of the Attorney General's office agreed that the stipends of the proposed intervenors would not be reduced during the pendency of this motion. Their motions for preliminary injunctions were accordingly deemed withdrawn. Had the Attorney General not thus graciously acceded to this court's request, the intervention of the two additional parties would have served a legitimate need in protecting the interests of that portion of the class facing an immediate loss of benefits. In the present posture of the case, the presence of the intervenors serves no discernible purpose, and their application to intervene is accordingly denied.

VI.

In addition to injunctive relief, plaintiff has also sought an order allowing her retroactive welfare payments for the months in which her stipend was improperly reduced. The question of retroactive welfare benefits is, at the moment, an unusually delicate one for the district judges of this Circuit. In *Rothstein* v. *Wyman,* 467 F.2d 226 (2nd Cir. 1972), cert. denied, 411 U.S. 921 (1973), our Court of Appeals, following *Ford Motor Co.* v. *Department of the Treasury of Indiana,* 323 U.S. 459 (1945), held that the Eleventh Amendment foreclosed a court from directing the retroactive payment of public assistance benefits. This view has its adherents. See *Westberry* v. *Fisher,* 309 F. Supp. 12 (D.Me. 1970); *Francis* v. *Davidson,* 340 F. Supp. 351 (D.Md. 1972); *Boucher* v. *Minter,* supra, at fn. 6.

On the other hand, four different three judge courts have granted the payment of retroactive benefits, and each of

those decisions was affirmed summarily by the Supreme Court. *Gaddis* v. *Wyman,* 304 F. Supp. 717 (S.D.N.Y. 1969), affd. sub nom. *Wyman* v. *Bowens,* 397 U.S. 49 (1970); *Shapiro* v. *Thompson,* 270 F. Supp. 331 (D.Conn. 1967), affd., 394 U.S. 618 (1969); *Zarate* v. *State Dept. of Health and Rehabilitative Services,* 347 F. Supp. 1004 (S.D.Fla. 1971), affd., 407 U.S. 918 (1972); *Sterrett* v. *Mothers and Childrens Rights Organization* —— F. Supp. —— (N.D. Ind. 1972), affd., 409 U.S. 809 (1972). The *Gaddis* and *Shapiro* decisions antedated the Second Circuit's decision in *Rothstein* but the court did not regard them as binding precedents on the Eleventh Amendment question. Rather, Judge McGowan, speaking for the court, stated that the Supreme Court had not "as yet addressed itself specifically and authoritatively to this issue." Given this view of the value of the summary affirmance, it is unlikely that the decision of the Court of Appeals would have been in any way altered by the affirmances in *Zarate* and *Sterrett.*

It is generally thought that a summary affirmance is a decision on the merits having precedential value. See *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *United States,* 400 U.S. 932 (1970) (White, J., dissenting); *Barton* v. *Sentner,* 353 U.S. 963 (1957) (Burton and Clark. J.J., dissenting); *United States ex rel. Fein* v. *Deegan,* 410 F.2d 13 (2nd Cir.), cert. denied, 395 U.S. 935 (1969); *Doe* v. *Hodgson,* 344 F. Supp. 964 (S.D.N.Y. 1972), affd., 478 F. 2d 537 (2nd Cir. 1973); Stern and Gressman, *Supreme Court Practice* 197 (4th ed. 1969). Nevertheless, the *Rothstein* court was obviously aware that the Eleventh Amendment defense had not been considered at length by the district courts in *Gaddis* and *Shapiro* (nor was it in *Zarate* or *Sterrett*). The court may then have concluded that, even though the question of retroactive benefits had technically been before the Supreme Court in those cases,

the new gloss placed on the problem by the Eleventh Amendment defense had not. Of course, if the import of the court's remark that the Supreme Court "has not yet come to grips" with the question be taken literally, it suggests that a summary affirmance has no precedential value whatever. See *Dillenburg* v. *Kramer,* 469 F.2d 1222 (9th Cir. 1972).

The matter now however appears ripe for determination by the Supreme Court. In *Jordan* v. *Weaver,* 472 F.2d 985 (7th Cir. 1973) the Seventh Circuit concluded (a) that the prior Supreme Court affirmances were entitled to full precedential force; (b) that at all events, the Eleventh Amendment is no bar to the payment of retroactive benefits; and (c) that even if the Eleventh Amendment was a bar, Illinois had "constructively consented" to such actions. The Supreme Court has granted certiorari —— U.S. ——, 41 USLW 3644 (June 12, 1973) and obviously will address the problem in the coming term.

Meanwhile, however, as a district judge I consider myself bound both by the Second Circuit's construction of the Eleventh Amendment and by its view of the precedential force of the various summary affirmances. Although suits by welfare recipients are numerous, the question of the Eleventh Amendment as a defense to the payment of retroactive benefits has been treated but rarely. I therefore regard the *Rothstein* decision as authoritative and accordingly deny plaintiff's motion for the payment of such benefits here.

In conclusion, plaintiff's motion that this proceed as a class action is granted. Plaintiff's motion for summary judgment is granted to the extent that an injunction shall issue permanently enjoining the enforcement of 18 N.Y.C.R.R. § 352.31(a)(3)(iv) and § 352.30(c) and (d). Plaintiff's motion is denied to the extent that it seeks an order directing the payment of retroactive welfare payments, and that portion of the complaint is dismissed. Defendants motion to dismiss for failure to state a cause of action is denied, as is its alternative motion for summary judgment. The motions of Clark and D'Alessio to intervene are also denied.

The parties are directed to settle an order on notice providing for an appropriate form of injunctive relief.

Dated: October 3, 1973.

ARNOLD BAUM
U. S. D. J.

FOOTNOTES

[1] 18 N.Y.C.R.R. § 352.31(a)(3)(iv):

§ 352.31 *Estimate of need and application of income*

(a) For applicant or recipient.

• • •

(3) When a female applicant or recipient is living with a man to whom she is not married, other than on an occasional or transient basis, his available income and resources shall be applied in accordance with the following:

• • •

(iv) When the man is unwilling to assume responsibility for the women or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(c)."

The reference to § 352.30(c) is erroneous; it is clear from the text of the section, set out at footnote 2, infra, that the reference should be to § 352.30(d).

[2] 18 N.Y.C.R.R. § 35230 *Persons included in the budget*

"(c) When an applicant or recipient wilfully fails or refuses to comply with the requirements of Part 385 of this Title, the needs of the family shall be determined as if he were a member of the family, however, the grant shall be provided on a pro rata basis for the eligible family members only.

(d) A non-legally responsible relative or unrelated person in the household, who is not applying for non receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and

treated as income to the family. For the lodger, the amount in excess of $15 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance."

[3] The ensuing account is adopted from plaintiff's statement submitted pursuant to Rule 9-G of the Southern District Rules in support of her motion for summary judgment. With one unimportant exception, none of the facts in that statement is disputed by the defendants.

[4] This computation was reached in accordance with the controverted state regulations, cited at footnotes 1 and 2, which provide that if a male lodger does not contribute at least $15 per month, the family shelter allowance shall be reduced by the lodger's *pro rata* share. The previous shelter allowance had been $150, and thus the male lodger's *pro rata* share was 1/5 x $150 or $30.

[5] Rule 23(a):

"(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

[6] Rule 23(b)(2):

"(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or"

[7] See the letter of Judith A. Gordon, Assistant Attorney General, to Jerold S. Slate of the Legal Aid Society of Westchester County, appended as Exhibit C to the Slate affidavits.

[8] From his concurring opinion in *United States Department of Agriculture* v. *Moreno*, —— U.S. —— at —— (June 25, 1973), it is apparent that Mr. Justice Douglas would regard the arguments based on privacy and freedom of association as substantial. In considering § 3(e) of the Food Stamp Act of 1964, 7 U.S.C.

§ 2012(e), which excludes from participation in the food stamp program any household containing an individual unrelated to any other member of that household, he observed: "[t]he right of association, the right to invite the stranger into one's home is too basic in our constitutional regime to deal with roughshod." The majority found the statute violative of the Due Process Clause of the Fifth Amendment and therefore did not reach these questions. See, however, the opinion of Judge McGowan for the three judge court below, *Moreno* v. *United States Department of Agriculture*, 345 F.Supp. 310 at 314 (D.D.C. 1972).

[9] 42 U.S.C. § 606(a) reads in full as follows:

"(a) The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;"

[10] 45 C.F.R. § 203.1 is set out in substance in *Lewis* v. *Martin*, 397 U.S. 552 (1970) at p. 556. It has been succeeded by 45 C.F.R. § 233.90(a), which incorporates its predecessor with relatively few changes. § 233.90(a) reads as follows:

(a) *State plan requirement.* A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's step-parent who is ceremonially married to the child's natural or adoptive parent, and is legally obligated to support the child under State law or general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-th-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for as-

suming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such ne tincome as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in home, of a "substitute parent" or "man-in-the-house" or any only such net income as is actually available for current use the absence of proof of actual contributions."

[12] Rules 14(b):

"(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

[13] By the same reasoning, permissive intervention is most appropriate where the court has determined a case unsuitable for class action treatment. Thus in *Doe* v. *Lavine*, 347 F.Supp. 357 (S.D.N.Y. 1972), Judge Gurfein granted motions to intervene by eight persons while finding that factual discrepancies precluded a class action designation. Similarly, Judge Mansfield in *Boone* v. *Wyman*, 295 F.Supp. 114 (S.D.N.Y. 1969), affd., 412 F.2d 857 (2nd Cir. 1969), cert. denied, 396 U.S. 1024 (1970), permitted intervention under Rule 24(b)2 but expressed doubt as to whether the prerequisites for a class action existed.

[14] Some courts have permitted intervention in class actions by applicants raising the same issues, and retaining the same attorneys, as the named plaintiffs. *Epstein* v. *Weiss*, 50 F.R.D. 387 (E.D.La. 1970), *Hicks* v. *Crown Zellerbach*, 49 F.R.D. 184 (E.D.La. 1968). The underlying rationale there appears to be that in such circumstances it hardly makes any difference whether intervention is permitted or denied.

APPENDIX D

Memorandum and Order of the Single District Judge in *Taylor* v. *Lavine*.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR: CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Plaintiffs,

against

ABE LAVINE, individually, and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Defendants.

APPEARANCES:

Leonard S. Clark, Esq.
Nassau County Law Services Committee, Inc.
285 Fulton Avenue
Hempstead, New York 11550

Theodore Hochstadt, Esq.
Of Counsel

Appendix D.

Honorable Louis J. Lefkowitz
Attorney General of the State of New York
2 World Trade Center
New York, New York 10047

Constance B. Margolin, Esq.
Of Counsel

Honorable Joseph Jaspan
County Attorney of Nassau County
Nassau County Executive Building
West Street
Mineola, New York

Vincent M. Esposito, Esq.
Of Counsel

WEINSTEIN, D.J.

Plaintiffs, for themselves and others similarly situated, move for summary judgment; defendants move to dismiss on the grounds of lack of jurisdiction and failure to state a claim upon which relief can be granted. Plaintiffs' motion must be granted.

Annie Taylor's rent allowance has been reduced by one-third on the presumption that her sister, who lives with her, is contributing to its payment. Charlotte Otey has had her rental allowance reduced by one-third on the presumption that her son, who lives with her, is contributing to household expenses. There is no evidence of such contributions by those adults living in plaintiffs' homes.

The ruling is said to be required by New York State Welfare Regulation 18, N.Y.C.R.R. 352.30(d) reading in part as follows:

> "A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving

Appendix D.

> public assistance shall not be in the budget and shall be deemed to be a lodger or boarding lodger . . . . In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance." 18 NYCRR 352.30(d) (1st and 4th sentences)

This regulation, incorporating as it does a presumption of financial support having no basis in fact, is alleged to be inconsistent with the applicable federal regulation, 45 C.F.R. 233.90(a), 36 Fed. Reg. 3868, reading as follows:

> "A state plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the employment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home of a 'substitute parent' or 'man-in-the-house' or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first

sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contribution."

Almost identical claims were before the District Court for the Southern District of New York, *Hurley* v. *VanLare*, 72-C-3423. The *Hurley* case involved a nonrelated male sharing the home. In a full opinion dated October 3, 1973 Judge Bauman ruled that the action was properly brought on behalf of a class and that the New York regulation was invalid because it was in conflict with federal law. See Appendix A, attached. The opinion is convincing and its reasoning on class action status, jurisdiction, inconsistency of the state regulation and injunctive relief is adopted by this court.

The class in *Hurley* can be construed as including the class in the instant case. If it is not, then a fortiori the plaintiffs before us are entitled to injunctive relief since it is no more likely that a sister or a son will share in the support of a household than will an adult unrelated cohabitating male.

The issue of retroactive benefits is more difficult. As plaintiffs admit (Brief pp. 29-30), the Second Circuit, unlike other circuits, denies retroactive benefits. Judge Bauman, as I do, felt bound by the rule of this Circuit. Were it open to the court, it would adopt what it considers the fairer rule, permitting the court to order retroactive payments where the family, and particularly the children, are continuing to suffer because of the deprivation. It is well known that rents must be paid and that given a fixed allowance and a rising rent or a fixed rent and a decreasing allowance, poor families will have to reduce expenditures for such necessities as food or clothing. It may well be that in the instant case there has been, for example, skimping on purchases of winter clothing or blankets for the

children in order to make up the one-third rental allowance deficit. This may well adversely affect their health during the coming winter when, we can judicially notice, fuel will be short in this area.

The defendants are urged to reexamine the situation of the plaintiffs to insure that there will be no adverse consequences to the children involved as a result of the failure of this court to order retroactive benefits.

Settle order on forty-eight hours notice.

So ordered.

Dated: Brooklyn, New York, October 10, 1973.

JACK B. WEINSTEIN
U.S.D.J.

APPENDIX E

Judgment and Order of August 15, 1974.

UNITED STATES DISTRICT COURTS

72 Civ. 3423 A.B.

FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Plaintiffs,

against

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Defendants.

73 Civ. 699

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR, CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Plaintiffs,

against

ABE LAVINE, individually, and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Defendants.

Appendix E.

This cause coming on to be heard upon remand from the United States Court of Appeals for the Second Circuit sub nom. *Taylor* v. *Lavine* for the convening of a three-judge district court pursuant to 28 U.S.C. §§ 2281 and 2284 to hear and determine plaintiffs' constitutional claims, and a consolidated three-judge court having been convened, and the plaintiffs having moved for a class action determination pursuant to Rule 23 of the Federal Rules of Civil Procedure and for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and motions to intervene as parties plaintiffs having been made pursuant to Rule 24 of the Federal Rules of Civil Procedure on behalf of Phyllis D'Alessio and Loretta Clark in *Hurley* v. *Van Lare,* and by Francesca Aloise in *Taylor* v. *Lavine,* and defendants Lavine and Van Lare having moved to dismiss the actions pursuant to Rule 12 of the Federal Rules of Civil Procedure or in the alternative for summary judgment, and the defendants not opposing plaintiffs' motion for a class action determination, and the three-judge court on June 26, 1974 having heard testimony and considered the evidence pursuant to Rule 43(e) of the Federal Rules of Civil Procedure, and having heard the argument of the attorneys for the parties herein, and the three-judge court having considered the evidence, memoranda of law, and due deliberation having been had, and upon the filing of the opinion of the three-judge court dated and filed the 5th day of August, 1974, and Circuit Judge Hays having filed a dissenting opinion, it is hereby

ORDERED that defendants' motions to dismiss the action or in the alternative for summary judgment be and the same hereby are denied, and it is further

ORDERED that the above entitled consolidated actions are maintainable as a class action pursuant to Rule 23 of the

Appendix E.

Federal Rules of Civil Procedure. The class of plaintiffs consist of all residents of the State of New York who are or were or will be receiving public assistance, and who have had their grants of public assistance reduced, terminated, suspended or denied, or who are or may be threatened with the reduction, termination, suspension or denial of public assistance solely because of the presence of a "lodger" in the home pursuant to 18 N.Y.C.R.R. §§ 352.31(a)(3)(IV) and 352.30(d); and it is further

ORDERED that plaintiffs' motion for summary judgment be and the same is granted to the extent hereinafter set forth; and it is further

ORDERED that defendants, their officers, agents, servants, employees, and successors be and hereby are permanently enjoined from enforcing 18 N.Y.C.R.R. §§ 352.31(a)(3)(IV) and 352.30(d) and from terminating, suspending or reducing grants of public assistance because of the presence in the home of a family receiving public assistance of a person who is not a recipient of public assistance and who has no legal obligation to support the public assistance family; and it is further

ORDERED that plaintiffs' motion for summary judgment be and the same hereby is denied to the extent it seeks an order directing the payment of retroactive welfare payments; and it is further

ADJUDGED AND DECREED that plaintiffs are entitled to and are hereby granted a declaratory judgment in this action that 18 N.Y.C.R.R. §§ 352.31(a)(3)(IV) and 352.30(d) and defendants' policy and practice of terminating, suspending or reducing grants of public assistance because of the presence in the public assistance family's home of a person who

Appendix E.

is not a recipient of public assistance and who has no legal obligation to support the public assistance family, violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Dated: New York, New York
August 15, 1974.

/s/ ARNOLD BAUMAN

/s/ JACK B. WEINSTEIN

.....

Judgment Entered:

August 15, 1974.

.....
Clerk

APPENDIX F

Notice of Appeal From Judgment and Order of August 15, 1974.

UNITED STATES DISTRICT COURTS

FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

72 Civ. 3423 A.B.

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Plaintiffs,

against

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Defendants.

72 Civ. 699

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Plaintiffs,

against

ABE LAVINE, individually, and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Defendants.

Appendix F.

SIRS:

PLEASE TAKE NOTICE that the defendants BARRY VAN LARE and ABRAHAM LAVINE hereby appeal to the Supreme Court of the United States from the Judgment and Order of the thiree-judge district court (HAYES, C.J. dissenting) dated the 15th day of August, 1974 and entered in the office of the Clerk of the United States District Court, Southern District of New York, on the same day which declared the action to be maintainable as a class action, permanently enjoined the enforcement of 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv) to the extent that said regulations authorize the termination, suspension or reduction of grants of public assistance solely because of the presence of a lodger and non-recipient in the home of a public assistance recipient and declared said regulations unconstitutional to the same extent, and the said defendants hereby appeal from each and every part of said Judgment and Order as well as the whole thereof.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York
August 20, 1974

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants

By: JUDITH A. GORDON
Assistant Attorney General
Office and P.O. Address
Two World Trade Center
New York, New York 10047

Appendix F.

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HON. GERALD HARRIS
Westchester County Attorney
Attorney for Defendant Louis P. Kurtis
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White Plains, New York 10601

HON. JOHN F. O'SHAUGHNESSY
Nassau County Attorney
Attorney for Defendant Shuart
1 West Street
Mineola, New York 11501

Filed August 20, 1974

APPENDIX G

Related Statutes and Regulations.

STATUTES AND REGULATIONS

FEDERAL STATUTES

42 U.S.C.

§ 601. *Appropriations*

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents to attain or retain capability for maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out this part. The sums made available under this section shall be used for making payments to states which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

§ 602. *State plans for aid and services to needy families with children; contents; approval by Secretary*

(a) A State plan for aid and services to needy families with children must

• • •

(7) . . . provide that the State agency shall, in determining need, take into consideration any other

income and resources of any child or relative claiming aid to families with dependent children, or any other individual living in the same household as such child or relative claiming such aid, as well as any expenses reasonably attributable to the earnings of any such income;

(10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals;

§ 606. *Definition*

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, cousin, nephew or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment.

(b) The term "and to families with dependent children" means money payments with respect to, or . . .

medical care in behalf of or any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care recognized under State law to meet the needs of the relative with whom any dependent child is living [as well as the spouse of such relative under certain conditions, and those of an individual described under § 602(a)(7)] . . . .

• • •

(c) The term "relative with whom any dependent child is living" means the individual who is one of the relatives specified in subsection (a) of this section and with whom such child is living (within the meaning of such subsection) in a place of residence maintained by such individual himself or together with any one or more of the other relatives so specified as his (or their) own home.

FEDERAL REGULATIONS

45 C.F.R.

§ 233.90 *Factors specific to AFDC*

(a) *State plan requirement*

A State plan under Title IV-A [AFDC] of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive

parent and is legally obligated to support the child under a State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only if the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

STATE STATUTES

Social Services Law

§ 131. *Assistance, care and services to be given*

1. It shall be the duty of the Social Services officials, insofar as funds are available for that purpose, to provide adequately for those unable to maintain themselves in accordance with the requirements of this Article [5—Assistance and Care] and other provisions of this chapter [55 of the Consolidated Laws of New York State]. They shall, whenever possible, administer such care, treatment and service as may restore such persons to a condition of self-support or self-care, and shall further give such service to those liable to become destitute as may prevent the necessity of their becoming public charges.

• • •

3. For needy persons who are members of a family household, the standard of need for determining eligibility for public assistance shall be as prescribed by section one hundred and thirty-one-a of this chapter and applicable federal requirements • • •.

§ 131-a *Monthly grants and allowances of public assistance*

1. Any inconsistent provision of this chapter or other law notwithstanding, social services officials shall, in accordance with the provisions of this section and regulations of the department, provide home relief, veteran assistance, old age assistance, assistance to blind, aid to the disabled and aid to dependent children, to needy persons who constitute or are members of a family household, who are determined to be eligible in accordance with standards of need established in subdivision two. Provision for such persons, for all items of need, less any available income or resources which are not required to be disregarded by other provisions of this chapter, shall be made in accordance with this section. Such provision shall be made in monthly or semi-montlhy allowances and grants within the limits of the schedules included in subdivision three of this section except for additional amounts which shall be included therein for shelter, fuel for heating, additional cost of meals for persons who are unable to prepare meals at home and for other items for which specific provision is otherwise made in article five. As used in this section the term "shelter" may include a grant not to exceed seven hundred and fifty dollars toward the purchase of an interest in a co-operative • • •.

(2) The following schedule shall be standard of monthly need for determining eligibility for all cate-

gories of assistance in and by all social services districts:

Number of Persons in Household

One	Two	Three	Four	Five	Six
$84	$134	$179	$231	$284	$329

For each additional needy person in the household there shall be added an additional amount of forty-five dollars monthly.

In addition to the above, the standard of need shall include amounts for shelter and fuel for heating, amounts for additional costs and meals for persons who are unable to prepare meals at home and amounts for other items when required by individual case circumstances for which specific provision is otherwise made in article five of this chapter.

• • •

§ 343 *Declaration of Object [of Aid to Dependent Children Program]*

It is hereby declared a state policy that aid to dependent children be provided under the provisions of this title in every county of the state.

§ 344. *Responsibility*

1. Each public welfare district shall be responsible for providing aid to dependent children, under this title, to persons eligible therefor who reside in its territory • • •.

§ 349. *Eligibility*

A. Aid to dependent children shall be given to a parent or other relative as herein specified for the

benefit of a child or minor under eighteen years of age, or of a minor under twenty-one years of age who is a student regularly attending high school in pursuance of a course of study leading to a high school diploma or its equivalent, or is regularly attending a course of vocational or technical training designed to fit him for gainful employment or of a college or university whose curriculum is approved by the state department of education • • •

§ 350. *Character and Adequacy*

1. (a) Allowances shall be adequate to enable the father, mother or other relative to bring up the child or minor properly, having regard for the physical, mental and moral well-being of such child or minor, in accordance with the provisions of section one hundred thirty-one-a of this chapter and other applicable provisions of law • • •.

STATE REGULATIONS

18 N.Y.C.R.R.

§ 352.3. *Rent allowances*

(a) Each social services district shall establish a monthly allowance schedule for rent based on that number of rooms, with or without heat, furniture and furnishings. Such allowance schedule shall provide a sufficient amount for all persons to obtain housing in accordance with standards of public health in the community. The schedule established shall be filed with the department. An allowance for rent shall be made in the amount actually paid by the recipient but not in

excess of the appropriate maximum of such schedule.[*]

• • •

(c) For children or adults in receipt of public assistance residing in the home of a self-maintaining non-legally responsible relative or friend or SSI beneficiary, the allowance for rent and/or other shelter costs shall be computed on a pro rated basis but not in excess of the appropriate agency maximum for the number of people in the assistance grant.[**]

§ 352.30. *Persons included in the budget*

(a) For budgetary purposes the agency shall include in its estimate of need and application of income all persons applying for or receiving public assistance and care and living as a unit within the same household. Members of the family temporarily absent from the home shall be included as a member of the household in the budgetary estimate, such as children or minors attending school away from home, except when maintenance is provided without cost.

• • •

---

[*] A state-wide maximum monthly shelter allowance schedule by county and by public assistance family size has been published in the 18 N.Y.C.R.R. but has not yet become effective.

[**] Effective July 26, 1974. Former subdivision (c) stated:

For children or adults in receipt of public assistance residing in the home of a self-maintaining non-legally responsible relative or friend, the allowance for rent and/or other shelter costs shall be computed on a pro rated basis.

§ 352.31. *Estimate of need and application of income.*

(a) FOR APPLICANT OR RECIPIENT.

(1) The estimated of need for any applicant or recipient shall include all items of need as specified in these regulations for persons in the circumstances under which such items are allowed. The amount to be included for each item of need shall be the appropriate amount provided in accordance with the schedues and other provisions of these regulations. To the extent that an item offered is otherwise provided it shall not be included in the estimate of need but the manner in which such item is provided shall be recorded.

APPENDIX H

Excerpts From the State Defendants' Answer and From the Case Record of Appellee Rose Hurley.

The state defendants' answer stated in part.

Factual Allegations

• • •

14. On or about September 15, 1970, a caseworker from the Westchester County Department of Social Services made an unannounced "home visit" to Mrs. Hurley at the first floor apartment on Hillside Avenue. During the course of that visit the caseworker observed the following items of furniture in the apartment among others: *Living room*—Color console television set; plush velvet sofa; plush velvet arm chairs; coffee table with ornaments; draperies; wall to wall carpet (green); *Master bedroom*—bedroom set; wall to wall carpet (blue); *Twins bedroom*—bunk beds; wall to wall carpet (red); *Doreen's bedroom*—wall to wall carpet; *Kitchen*—five piece dinette set.

15. Upon inquiry to Mrs. Hurley, the caseworker was advised that the foregoing items had been given to Mrs. Hurely by a male friend (one ADR) and that the furniture which had been purchased with the November 18, 1967 grant was stored in the basement with the exception of the furniture in Doreen's room. (A copy of the caseworker's report of the September 15, 1970 "home visit" is annexed hereto and marked Defendants Exhibit "A" [DXA]).•

• Plaintiffs attorney has advised that he contests the allegations made in the foregoing paragraph. Accordingly, defendants plan to offer proof of these facts at trial and/or through depositions taken subsequently.

Appendix H.

The case record of appellee Rose Hurley maintained by the Westchester County Department of Social Services states in part:•

HURLEY, Rose
210 Hillside Avenue
Mount Vernon, New York

ADC

9/15/70

Home Visit and Reinvestigation:

Since worker had not visited the Hurley's household, since Mrs. H. had moved downstairs, worker made an unannounced home visit to the Hurley's household. Mrs. Rose Hurley lives in a 6 room apartment on the first floor of a two family house. The rent remains $150.00 and the utilities are extra. The security has been transferred from Mrs. Hurley's upstairs apartment to her downstairs apartment. The landlord is Mr. Peter Adamo, PE-8-3162 of 18 Maple Avenue, Pelham, New York. Mrs. Hurley claims that she was able to obtain this apartment after the Adamo's separated and are now divorced. There is no verification of rent and worker asked that receipt for three months be presented to our office by 9/28/70, or we will hold her 10/1 grant. Mrs. Hurley lives with her three children and Mrs. Hurley's husband's whereabouts are unknown. Mrs. Hurley is seeking a divorce but has not filed for one as of yet. Mrs. Hurley claims she has not "gotten around to obtaining one".

Health:

The twins, Jamie and John, born 8/9/67, are fine; their health is good; their physician is Dr. Kessler of Mount

---

• The ensuing report was submitted to the court as the State Defendants Exhibit A annexed to their Answer.

Vernon. Daughter, Doreen, 4/18/62, is a diabetic for which Mrs. Hurley gives her insulin, Globin N-40, every morning. Mrs. Hurley maintains that Doreen will be taught to administer these injections by the Mt. Vernon Nursing Service. Doreen was hospitalized on 5/12/70, released either 5/29 or 6/4/70 from the Presbyterian Hospital, New York City for cystitis fibrosis (see correspondence). Mrs. Hurley stated that this occurrence placed a great strain on her physical as well as her mental health. She stated that she would visit Doreen every day, getting the twins prepared to stay with their grandparents each day, traveling back and forth to New York City and returning for evening visits to see Doreen. After Doreen was discharged from the hospital, she placed additional strain on her mother as she was very demanding by being bedridden. Mrs. Hurley claims that Doreen was promoted to the third grade considering what she had experienced medically in the last year. Doreen had a tutor from the Board of Education. Doreen attends St. Catherine's Parochial School in Pelham, New York. Mrs. Hurley expressed satisfaction over Doreen's improvement but she maintains that Doreen must be given special attention due to her condition.

At this time, worker questioned Mrs. Hurley as to her new furniture. Mrs. Hurley maintainss that her boyfriend [ADR], helps her out and that he completely furnished her apartment. The living room [is] comprise[d] of colored console television, spanish mediterranean plush velvet sofa of red and green. The two high back plush velvet arm chairs are of green and red and there are gold and black draperies in this living room. There is also green wall to wall carpeting and a very heavy ornamentated spanish mediterranean coffee table with two crystal ornaments. In the master bedroom [ADR], has purchased a huge mediterranean bedroom set and blue wall to

wall carpeting. The twins room is in a red and white with red and white bunk beds and red wall to wall carpeting. Doreen's furniture remains the same but [ADR] has also placed wall to wall carpeting in her room. Mrs. Hurley claims that [ADR] has several businesses and that he is in his early 30's and that he lives at 240 East Prospect Avenue, Mt. Vernon. His apartment, she maintains makes hers look like nothing, in other words there is no comparison between the two. In the kitchen [ADR] has purchased a beautiful 5 piece dinette set which has high back chairs of black vinyl and a hexagon shaped dinette table. When worker questioned Mrs. Hurley about previous furniture, she claim that she had stored most of these in the basement because some day she plans to marry [ADR] and have a home of her own in which these items may be placed also.

APPENDIX I

Opinions in *Battle* v. *Lavine*.

Decision and Order of Special Term.

Short Form Order August 10 1973

SUPREME COURT

STATE OF NEW YORK

SPECIAL TERM, PART 1.—NASSAU COUNTY

Present: HON. ALEXANDER BERMAN, Justice.

In the Matter of the Application of

LOIS BATTLE, individually, etc.,

Petitioner,

for a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules, etc., ABE LAVINE, and JAMES M. SHUART, etc.,

Respondents.

Upon the foregoing papers it is ordered that this motion in an Article 78 proceeding to annul and reverse a determination made by a fair hearing referee which confirmed a decision of the Department of Social Services is denied.

The petitioner contends that there has been an arbitrary and capricious denial of her rights with regard to the elimination of her shelter allowance.

The Department of Social Services questioned the amount of her shelter allowance after receiving information that the petitioner was the mother of a child born out of wedlock, and that the putative father of the child is the

Appendix I.

son of the petitioner's landlord. Both the putative father and the landlord reside in the same house as the petitioner. Upon receipt of the above information, the Department of Social Services sought to decrease the petitioner's shelter allowance, in conformance with 18 NYCRR 352.3(c), which states:

> "For children or adults in receipt of public assistance residing in the home of a self-maintaining, non-legally responsible relative or friend, the allowance for rent and for other shelter costs shall be computed on a pro-rata basis."

There is no doubt that the petitioner falls within the definition of the regulation. The Court does not agree with petitioner's strained interpretation to the contrary.

The petitioner also contends that 18 NYCRR 352.3(c) is in violation of the Supremacy Clause of the United States Constitution, Article VI, Clause 2, and furthermore, that the State regulation is in conflict with 45 C.F.R. Sec. 233.90(a), which states in relevant part:

> ". . . the inclusion in the family or the presence in the house of a 'substitute parent', or 'man-in-the-house' or any individual . . . is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State . . ."

The regulation, 18 NYCRR 352.3(c) does *not* contravene this regulation. This section of the NYCRR has been upheld in Matter of Noto v. Lavine, 71 Misc 106, and Matter of Morning v. Wyman, 39 A.D.2d 645. The regulation was applied recently by Mr. Justice DiPaola of this Court, in Codrington v. Lavine & Shuart Index No. 6319/73. The regulation does not make any recipient ineligible because of the nature of the relationship of those living in the same abode as the recipient.

Appendix I.

In carrying out the valid New York regulation, the action initiated by the Department of Social Services sought verification of mortgage payments. This documentation was requested so that the shelter allowance could be *adjusted,* not *terminated.* The petitioner's failure to abide by the lawful regulations of the NYCRR caused the Department of Social Services to correctly discontinue the petitioner's shelter allowance.

The petitioner claims she will suffer immediate and irreparable harm unless she is re-granted her shelter allowance. Nowhere has the petitioner shown any evidence that she has attempted to obtain shelter elsewhere and that she was unable to obtain same.

The stay heretofore granted prohibiting revocation of the shelter allowance assistance is extended for thirty days from the date of this order, to permit the petitioner to obtain shelter elsewhere.

Dated, August 9, 1973.

A. BERMAN
J. S. C.

Appendix I.

Opinion of the Appellate Division, Second Department.

April 22, 1974

SUPREME COURT

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

HOPKINS, Acting P.J., SHAPIRO, CHRIST, BRENNAN and BENJAMIN, JJ.

[SAME TITLE]

APPEAL from a judgment of the Supreme Court at Special Term (ALEXANDER BERMAN, J.), dated August 9, 1973 and entered in Nassau County, which denied petitioner's application pursuant to article 78 of the CPLR (1) to annul a determination of the Department of Social Services of the State of New York affirming, after a statutory fair hearing, a determination of the Nassau County Department of Social Services reducing petitioner's public assistance grant, (2) to declare unconstitutional a provision in the Rules and Regulations of the State Department of Social Services and (3) to direct respondents to adjust petitioner's grant.

BENJAMIN, J. This is an appeal by the petitioner from a judgment of the Special Term in Nassau County which denied her application pursuant to article 78 of the CPLR (1) to annul a determination of the respondent Department of Social Services of the State of New York, made after a fair hearing, affirming a decision of the respondent local agency reducing the petitioner's public assistance grant; (2) to declare unconstitutional the pertinent provision of

the Department's regulations; and (3) to direct the respondents to adjust the petitioner's grant, effective May 1, 1973, to include her previously budgeted shelter allowance in the sum of $125 per month.

We reverse the judgment and grant the petitioner all the relief sought by her.

The petitioner was a recipient of aid in the category of Aid to Families with Dependent Children. She was receiving a shelter allowance of $125 per month. She rented one room in a one-family, two-story dwelling. Also residing in the residence were the landlord and his son and daughter and two other tenants. In August of 1972, the petitioner informed the Nassau County Department of Social Services (hereinafter "the agency") that she was pregnant. A child was born in the following March and the birth certificate indicates that the landlord's son is the child's father.

On January 10, 1973, the petitioner received from the agency a notice of intent to reduce her grant by $125 (the amount of the shelter allowance) for the following reason: "Your landlord refuses to provide us with verification of his mortgage so that we can allow you a proportionate share of shelter since you are living with 'friends'." The statutory authority for a reduction based upon one's living with a friend is found in subdivision (c) of section 352.3 of the Regulations of the Department of Social Services of the State of New York, the challenged section. This section states: "For children or adults in receipt of public assistance residing in the home of a self-maintaining, nonlegally responsible relative or friend, the allowance for rent and/or other shelter costs shall be computed on a prorated basis."

On January 23, 1973, the petitioner requested a fair hearing to review the decision to reduce the grant. A hearing at which the petitioner was represented by counsel was held on April 4, 1973 and a decision affirming the reduction was rendered on April 25, 1973. On May 30, 1973, the petitioner commenced the instant proceeding pursuant to article 78 of the CPLR. Relief was denied and this appeal followed.

We note initially that, while an article 78 proceeding is generally not the proper vehicle by which to challenge the constitutionality of a statute or ordinance, if all of the necessary parties to an action for such relief have appeared in such a proceeding, the court may treat the application as an action for a declaratory judgment and may retain jurisdiction to resolve any constitutional issues (*Matter of Gold* v. *Lomenzo,* 29 N Y 2d 468). The respondents claim here that the Department of Health, Education and Welfare of the United States (H.E.W.) is a necessary party which was not joined in the proceeding. But where a petitioner has not sought to cut off all federal funds by his action, HEW is not a necessary party (see, e.g., *Shapiro* v. *Thompson,* 394 U. S. 618; *King* v. *Smith,* 392 U. S. 309; *National Welfare Rights Organization* v. *Wyman,* 304 F. Supp. 1346, 1349). Accordingly, for the pupposes of reaching the constitutional issue involved, we will consider the relief sought as requesting a declaratory judgment.

The decision at Special Term held, *inter alia,* that the challenged section was not violative of the Supremacy Clause of the United States Constitution (art. VI, clause 2) in that it did not contravene subdivision (a) of section 233.90 of title 45 of the Code of Federal Regulations, which states, in relevant part:

> "The inclusion in the family, or the presence in the home, of a 'substitute parent', or 'man in the house', or any individual * * * is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the state."

We do not agree and now hold that section 352.3 (subd. [c]) must fall as, on its face, it is violative of the Supremacy Clause. The section sanctions that which the above-mentioned Federal regulation prohibits.

Two positions have been urged to take subdivision (c) of section 352.3 out of the proscription. Neither succeeds. The first is that the purpose of the State regulation is to forbid a non-eligible individual from indirectly receiving State assistance from a qualified recipient by living with that person (the respondents' contention). The second is that the purpose of the State regulation is to assure that the qualified recipient is not receiving additional support from the person with whom he is living.

The first position was expressly rejected and found inconsistent with the above-mentioned Federal regulation in *Hurley* v. *Van Lare* (365 F. Supp. 186). Notwithstanding the respondents' protestations that their concern is that ineligibles not receive a rental stipend, the inevitable result of the State regulation under attack is to reduce, perhaps drastically, the stipend for those who are eligible. Here, the allowance was reduced by 100%, which must force the recipient to attempt to meet the rental payments out of portions of her welfare stipend intended for food and clothing.

The second position has been widely rejected and its assertion in the past actually led Congress to enact subdivision (a) of section 233.90 of the Federal regulation (see *King* v. *Smith,* 392 U. S. 309, *supra; Hurley* v. *Van Lare,* 365 F. Supp. 186, *supra; Boucher* v. *Minter,* 349 F. Supp. 1240). To argue that this position does not contravene the Federal regulation is thus totally without merit.

Accordingly, we reverse the judgment, on the law, without costs but with disbursements, annul the determinations in question, declare subdivision (c) of section 352.3 of the State Regulations unconstitutional and direct the respond-

ents to reinstate the shelter allowance to the petitioner as of May 1, 1973.

HOPKINS, Acting P.J., SHAPIRO and BRENNAN, JJ., concur.

CHRIST, J. (concurring in part). I concur with the majority that the judgment should be reversed and that the petitioner's shelter allowance should be reinstated. I differ in that I do not find it necessary to reach the constitutionality of subdivision (c) of section 352.3 of the State Regulations. That provision pertains only to recipients of welfare aid who are "residing in the home of a self-maintaining, nonlegally responsive relative or friend." The petitioner is not such a recipient and does not come within the provision.

The petitioner is unmarried and lives with her year-old infant son in a furnished room for which she pays $125 per month rent. The house is occupied by four separate families with separate accommodations. The landlord's son is the father of the petitioner's child. He does not live with the petitioner and the record shows her to be the sole occupant of her rented room. The landlord-grandfather has no obligation to support the petitioner and he does not do so. He charges and collects the rent.

The respondents discontinued the rent allowance to the petitioner because she was unable to procure information about the landlord's mortgage obligations.

The record is devoid of any proof that the petitioner has the mortgage information or whether she could even procure it. There is no evidence to indicate that the rent paid is unreasonable or that the petitioner does not need the shelter allowance. Additionally, there is no proof that the landlord and the petitioner are acting collusively. And the landlord has not been shown to be a responsible relative or friend. It is important to note that the petitioner,

while under oath at the hearing, was never examined as to any of these facts.

It would seem to me, as it did to the hearing officer, that to require this petitioner, as a condition to receiving welfare relief payments for shelter, to procure a statement from the landlord concerning his mortgage payments is unreasonable. The best source of this information would be the public mortgage record and, if more is required, a subpoena to the landlord to produce his records and to take testimony concerning them would be in order.

This case must be decided for the appellant whether the State regulation is held constitutional or not. Accordingly, that question is immaterial to the result and we need not reach it.

Supreme Court, U. S.
FILED
FEB 18 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-453

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants,

against

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

JURISDICTIONAL STATEMENT FILED OCTOBER 18, 1974
PROBABLE JURISDICTION NOTED DECEMBER 9, 1974

No. 74-5054

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR, CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Petitioners,

against

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, JAMES M. SHUART, individually and in his capacity as Commissioner of the Nassau County Department of Social Services, BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, and LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 2, 1974
CERTIORARI GRANTED DECEMBER 9, 1974

VOL. I—Pages 1 to 408

INDEX TO APPENDIX

VOLUME I

	PAGE
Relevant Docket Entries in *Hurley* v. *Van Lare*	1
Relevant Docket Entries in *Taylor* v. *Lavine*	7
PROCEEDINGS BEFORE THE SINGLE DISTRICT JUDGE IN HURLEY v. VAN LARE, 72 CIV. 3423, S.D.N.Y.	
Amended Complaint	15
Notice of Motion for an Order Determining Class Action and Summary Judgment on Behalf of Rose Hurley	29
Affidavit of Rose Hurley in Support of Motion	32
Decision After Fair Hearing, Exhibit "A" to Hurley Affidavit	36
Statement Pursuant to General Rule 9-G of the Rules of the Southern District of New York in Support of Motion for Summary Judgment	38
Notice of Motion to Intervene, for Preliminary Injunction and Class Action Determination on Behalf of Phyllis D'Alessio	41
Affidavit of Phyllis D'Alessio in Support of Motion	43
Correspondence Regarding Matrimonial Action, Exhibits "A", "B", "C" and "D" to D'Alessio Affidavit	48
Notice of Intent to Change Public Assistance Status, Exhibit "E" to D'Alessio Affidavit	53

PAGE

Memorandum from Rachel Goldfinger to Phyllis D'Alessio, Exhibit "F" to D'Alessio Affidavit 55

Notice of Motion to Intervene and for Preliminary Injunction on Behalf of Loretta Clark 56

Affidavit of Loretta Clark in Support of Motion 58

Notice of Intent to Reduce Public Assistance, Exhibit "A" to Clark Affidavit 61

Decision After Fair Hearing, Exhibit "C" to Clark Affidavit 63

Notice of Motion to Dismiss Amended Complaint or for Summary Judgment on Behalf of State Defendants 66

Defendants' Statement Pursuant to General Rule 9-G of the Rules of the Southern District of New York and in Opposition to Plaintiffs' 9-G Statement 67

Answer of County Defendant 68

Regulatory History of 18 NYCRR §§ 352.30(d) and 352.31(a)(3)(iv) Submitted in Response to Notice to Produce Directed to State Defendants 71

Opinion of District Judge Arnold Bauman 74

Judgment and Order 95

Amended Judgment and Order 98

Plaintiffs' Notice of Appeal to the Court of Appeals for the Second Circuit 101

PAGE

State Defendants' Notice of Appeal to the Court of Appeals for the Second Circuit 102

County Defendants' Notice of Appeal to the Court of Appeals for the Second Circuit 103

PROCEEDINGS BEFORE THE SINGLE DISTRICT JUDGE IN TAYLOR V. LAVINE, 73 Civ. 699, E.D.N.Y.

Complaint 107

Decision After the Fair Hearing, Exhibit "A" to Complaint 120

Answer of State Defendant 122

Decision After Fair Hearing, Exhibit "A" to Answer of State Defendant 126

Answer of County Defendant 129

Notice of Motion for Summary Judgment on Behalf of Annie Taylor and Charlotte Otey 133

Motion for Summary Judgment 134

Affidavit of Theodore Hochstadt in Support of Motion 135

Letter From Justin B. Stone to Theodore Hochstadt, Exhibit "A" to Hochstadt Affidavit 138

Notice of Cross-Motion to Dismiss Complaint and for Summary Judgment on Behalf of State Defendants 139

Memorandum and Order of District Judge Jack B. Weinstein 140

PAGE

Judgment and Order 144

Amended Judgment and Order 146

State Defendant's Notice of Appeal to Court of Appeals for the Second Circuit 148

PROCEEDINGS BEFORE THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN THE CONSOLIDATED APPEALS OF TAYLOR v. LAVINE, DOC. No. 73—2731, AND HURLEY v. VAN LARE, DOC. No. 73—2671.

Letter from David S. Kellogg to Borge Varmer Submitted by State Appellants 153

Letter From Elmer W. Smith to David S. Kellogg Submitted by State Appellants 155

Opinions of the Court of Appeals for the Second Circuit 157

Order Denying Petition for Rehearing 185

PROCEEDINGS BEFORE THE THREE-JUDGE COURT FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK IN HURLEY v. VAN LARE, 73 CIV. 3423, AND TAYLOR v. LAVINE, 73 CIV. 699, ON REMAND FROM THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

Additional Regulatory History of 18 NYCRR §§ 352.30(d), 352.31(a)(3)(iv) and Related Regulations Submitted in Response to Notice to Produce Directed to State Defendants 189

Interrogatories to Defendant Lavine 200

PAGE

Defendant Lavine's Answers to the Interrogatories .. 203

Order to Show Cause for Order Granting Intervention on Behalf of Francesca Aloise 205

Affidavit of Francesca Aloise in Support of Order to Show Cause 206

Notice of Intent to Reduce Public Assistance, Exhibit "A" to Complaint of Applicant for Intervention 208

Decision After Fair Hearing, Exhibit "B" to Complaint of Applicant for Intervention 211

Answer of State Defendants in *Hurley* v. *Van Lare* .. 215

Excerpts From Case Record of Rose Hurley, Exhibit "A" to State Defendants' Answer 221

Partial Stipulation of Facts in *Taylor* v. *Lavine* 225

Supplemental Affidavit of Rose Hurley in Support of Motion for Class Action and Summary Judgment 231

Second Supplemental Affidavit of Rose Hurley in Support of Motion 233

Supplemental Affidavit of Phyllis D'Alessio in Support of Motion 235

Supplemental Affidavit of Loretta Clark in Support of Motion 237

Affidavit of Susan E. Smith in Support of Motion ... 240

Table, Exhibit "A" to Smith Affidavit 243

PAGE

Detailed Characteristics, New York 1970 Census of Population, Exhibit "B" to Smith Affidavit 245

Affidavit of Garry W. Bickel, in Support of Motion .. 246

Table, Exhibit "A", to Bickel Affidavit 249

Table, Exhibit "B", to Bickel Affidavit 251

Metropolitan Housing Characteristics—New York, N. Y., 1970 Census, Exhibit "C" to Bickel Affidavit 253

Affidavit of John T. Hand in Support of Motion 254

Letter From John T. Hand to Applicants to Legal Aid Divorce Unit, Exhibit "A" to Hand Affidavit 256

Affidavit of Linda Harmon in Support of the Constitutionality of 18 NYCRR § 352.30(d) 257

Affidavit of Marvin Rachlin in Support of the Constitutionality of 18 NYCRR § 352.30(d) 261

Transcript of Hearing on June 26, 1974 (Excerpts).. 267

General Social and Economic Characteristics—New York, 1970 Census, Plaintiffs' Exhibit "A" 363

Detailed Housing Characteristics—New York, 1970 Census, Plaintiffs' Exhibit "B" 365

"Conclusions" From *Survey Report on Rental Housing*—New York, 1969, Plaintiffs' Exhibit "C" .. 367

"Welfare Housing" From *The Urban Housing Dilemma,* New York City, Plaintiffs' Exhibit "D".. 368

VOLUME II

PAGE

Excerpts From *Recent Housing Trends in Westchester County*—Westchester County, 1974, Plaintiffs' Exhibit "E" 410

Excerpts From Report of Housing and Rent Study Group, Temporary State Commission on Living Costs and the Economy, New York, Plaintiffs' Exhibit "F" 415

Excerpts From Residential Analysis, Westchester County, Interim Report 3—*Growth of Demand and Supply, 1970-1990,* Plaintiffs' Exhibit "G".. 420

Excerpts From Residential Analysis, Westchester County, Interim Report 5—Housing Requirements: Sub-market Housing Groups, Plaintiffs' Exhibit "H" 448

Excerpts From Residential Analysis, Westchester County, Interim Report 7—*Welfare: Households and Housing,* Plaintiffs' Exhibit "I" 470

Notice of Intent to Change Public Assistance Status, Plaintiffs' Exhibit "J" 488

Memorandum From Rachel Goldfinger to Phyllis D'Alessio, Plaintiffs' Exhibit "K" 490

Westchester County Maximum Shelter Allowance Schedule, Plaintiffs' Exhibit "L" 491

Nassau County Maximum Shelter Allowance Schedule, Plaintiffs' Exhibit "M" 495

Resume of Dr. Herbert J. Gans, Plaintiffs' Exhibit "O" 496

PAGE

Shelter Allowance Schedules, Defendants' Exhibit "B" 522

Excerpts From *Simplified Methods for Determining Needs,* HEW, 1964, Defendants' Exhibit "C" .. 604

Excerpts From *Shelter Costs and Selected Shelter Characteristics of New York State Public Assistance Recipients,* 1971 N.Y.D.S.S. Shelter Cost Survey, Defendants' Exhibit "D" 614

Letter From David S. Kellogg to Borge Varmer and Letter From Elmer W. Smith to David S. Kellogg, Defendants' Exhibit "E" 620

Notice of Motion to Strike on Behalf of Rose Hurley 624

Affidavit of Martin A. Schwartz in support of Motion 625

Affidavit of Judith A. Gordon in Opposition to Motion to Strike 628

Order Granting Motion to Strike 632

Amended Answer of State Defendants in *Hurley* v. *Van Lare* 634

Opinions of the Three-Judge District Court 639

Judgment and Order 661

State Defendants' Notice of Appeal to the Supreme Court of the United States 664

Relevant Docket Entries in *Hurley* v. *Van Lare.*

72 Civ 3423, [S.D.N.Y.] Rose Hurley vs Van Lare et al.

DATE	PROCEEDINGS
Aug. 11-72	Filed Complaint & issued summons.
Aug. 31-72	Filed Amended Complaint.
Sep. 12-72	Filed Pltff's Notice to take depositions & request to produce.
Jan. 18-73	Filed Pltffs affdvt & notice of motion for an order determining class action & for summary judgment. Ret: 1-31-73.
Jan. 18-73	Filed Pltffs memorandum of law in support.
Jan. 24-73	Filed Transcript of record of proceedings, dated 11-10-72 Deposition.
Feb. 8-73	Filed Intervene Pltffs affdvt & Notice of motion for a preliminary injunction & class action determination & a temporary restraining order. Ret: 3-9-73.
Feb. 8-73	Filed Intervene Pltffs memorandum of law in support.
Feb. 21-73	Filed Stip & Order that the pltffs motion for summary judgment are adjourned to 3-9-73. And that the defts will serve on pltffs counsel defts motion to dismiss or for summary judgment on or before 2-23-73. So Ordered 2-20-73. BAUMAN, J.
Mar. 6-73	Filed Defts affdvt & notice of motion for an order dismissing amended complaint. Ret: 3-9-73.
Mar. 6-73	Filed Defts Statement pursuant to General Rule 9(g) of the S.D.N.Y. in opposition to pltffs statement.
Mar. 6-73	Filed Defts memorandum of law.
Mar. 6-73	Filed Defts memorandum of law in opposition to proposed intervenors-pltffs motions to intervene & for temporary restraining order or preliminary injunction.

Relevant Docket Entries in Hurley v. *Van Lare.*

DATE	PROCEEDINGS
Apr. 2-73	Filed deft's memo of law. in opposition to proposed motion to Intervene
Oct. 4-73	Filed pltf. memo in opposition to motion to dismiss.
Oct. 4-73	Filed deft. supporting affdvt. in support of motion to dismiss.
Oct. 4-73	Filed notice of motion to intervene and for preliminary injunction by Loretta Clark.
Oct. 4-73	Filed OPINION #39,877—Pltff's motion that this proceed as a class action is granted. Pltff's motion for summary judgment is granted to the extent that an injunction shall issue permanently enjoining the enforcement of 18 N.Y.C.R.R. Sec. 352.31 (a)(iv) and Sec. 352.30(c) and (d). Pltff's motion is denied to the extent that it seeks an order directing the payment of retroactive welfare payments, and that portion of the complaint is dismissed. Defts' motion to dismiss for failure to state a cause of action is denied, as is its alternative motion for summary judgment. The motions of Clark and D'Alessio to intervene are also denied. The parties are directed to settle an order on notice providing for an appropriate form of injunctive relief—Bauman, J.
Oct. 15-73	Filed judgment & order that pltffs action is maintained as a class action. Ordered that defts motion to dismiss action or in the alternative for summary judgment are denied. The motions to intervene on behalf of Phyllis D'Alessio & Clark are denied. Ordered, that pltffs motion for summary judgment is granted. Ordered that defts, etc. are permanently enjoined from enforcing 18 NYCRR Sec. 352.31(a) (3)iv & 352.30(c) & (d). Ordered, that pltffs

Relevant Docket Entries in Hurley v. *Van Lare.*

DATE	PROCEEDINGS
	motion for summary judgment is denied that it seeks an order directing payment of retroactive welfare payments. Adjudged & Decreed that pltffs are granted a declaratory judgment. Ordered that order is stayed pending a timely appeal by defts to Court of Appeals, at which time stay will continue pending final disposition of any or all appeals taken herein . . . Bauman, J. Judgment Entered, 10-16-73.
10/26/73	Filed defts. Lare and Lavine notice of appeal from final order and judgment. (n/m to Legal Aid and John S. Mead)
11/1/73	Filed plaintiffs' Notice of Appeal from part of the final judgment and order of October 15, 1973. $5.00 filing fee paid. (m/n)
11/5/73	Filed deft. Kurtis' Notice of Appeal from part of the final judgment and order of October 15, 1973. $5.00 filing fee paid. (m/n)
11/28/73	Filed notice that record on appeal has been certified & transmitted to U.S. Court of Appeals 11-28-73.
12/17/73	Filed affdvt. of Judith A. Gordon
12/17/73	Filed amended Judgment and order that pltffs' motion for summary judgment be and the same hereby is denied to the extent it seeks an order directing the payment of retroactive welfare payments—that execution of this order is stayed pending a timely appeal by defts., at which time this stay will continue pending final disposition of any or all appeals taken—Bauman, J.—Judgment entered Clerk—m.n.
12/20/73	Filed true copy of USCA order remanding action to the Dist. Court for the purpose of correcting the original judgment—

DATE	PROCEEDINGS
6/4/74	Filed pltffs request for production of documents.
6/14/74	Filed Pltffs' Request for Admission of Facts.
6/18/74	Filed Pltffs' Notice of Motion for Three-Judge Court ret 6-21-74.
6/18/74	Filed Pltffs' Memo of Points and authorities in support of motion for 3-Judge Court.
6/18/74	Filed Defts' Affdvt in opposition to 3-Judge Court.
6/18/74	Filed Memo—End on back of Motion for 3-Judge Court filed on 6-18-74.—Motion granted. So Ordered. Bauman, J.
6/26/74	Filed Pltffs' Supplemental Affdvt. in support of motions for Class Action and Summary Judgment.
6/26/74	Filed Proposed Intervenor's affdvt. in support of motion to intervene for a Preliminary Injunction.
6/26/74	Filed Pltffs' memorandum of Points and Authorities.
6/26/74	Filed Appendix to Pltff's memorandum of Points and Authorities.
6/26/74	Filed Defts' Memorandum of Law to the Three-Judge Court.
7/2/74	Filed Affidavit of Linda Harmon dated June 25-74.
7/2/74	Filed Partial Stip of Fact. (filed in 73 Civ 699—Eastern Dist. Ct.)
7/2/74	Filed Lavine's responses to pltffs' interrogs.
7/2/74	Filed ANSWER to the Amended Complaint.
7/3/74	Filed Reply Brief for Pltffs.

DATE	PROCEEDINGS
7/8/74	Filed pltffs affdvt & notice of motion to strike certain paragraphs, etc. Ret. 7-19-74.
7/9/74	Filed supplemental affdvt of Rose Hurley in support of motions for class action & summary judgment.
7/15/74	Filed pltffs affdvt in support from Bureau of Social Science Research.
7/22/74	Filed Defts affidavit in opposition to pltffs' motion.
7/24/74	Filed Memo—End on back of Motion filed Jul 8-74. . . . Motion granted. Settle order on two days notice. So Ordered. Bauman, J.
Aug. 1-74	Filed Order that para. 14 & 15 of defts. Van Lare & Lavine's answer and Exhibit "A" to deft. Van Lare and Lavine's answer be and hereby are stricken from the answer, further Ordered that Exhibit "A" to Deft. Van Lare and Lavine's answer be sealed so as to protect the confidentiality . . . Ordered that defts Van Lare & Lavine file an amended answer in conformity with order within 5 days after the date of its entry . . . Bauman, J. m/n
Aug. 1-74	Filed Sealed envelope with Exhibit "A" of Deft's Answer. Ordered sealed by order of Judge Bauman, dated 8-1-74.
Aug. 8-74	Filed transcript of record of proceedings, dated June 26, 1973
Aug. 14-74	Mailed notice of reassignment.
Aug. 14-74	Filed Amended Answer (State defts.)
Aug. 15-74	Filed OPINION #41,063—Sec. 18 N.Y.C. R.R. & 352.30(d) & S352.31(a)(3)(lv) are invalid to the extent stated in this opinion. The parties shall settle an order on forty-

Relevant Docket Entries in Hurley v. *Van Lare.*

DATE	PROCEEDINGS
	eight hours notice. . . . So Ordered—Weinstein, J. Bauman, J.
Aug. 15-74	Filed Judgment & Order. Ordered pltffs. motion for summary judgment is granted to the extent, etc. & defts. their officers, agents, etc. are permanently enjoined as indicated; & pltffs. motion for summary judgment is denied to the extent is seeks an order directing the payment of retroactive welfare payments; & Adjudge & Decreed that pltffs. are entitled to & are granted declaratory judgment as indicated. Judgment Entered 8/19/74 Clerk Entered 8/19/74. (mailed notice)
Aug. 20-74	Filed Notice of Appeal to the Supreme Court of the United States from Judgment & order of the 3 Judge court entered 8/15/74 in the SDNY Court.
Nov. 27-74	Filed Order that the Clerk of this court is hereby authorized & directed to transmit all the original papers filed in this court to the U.S. Supreme Court & said records be returned upon the conclusion of this appeal. Ward J.
Nov. 29-74	Certified & Transmitted the Record to the U.S. Supreme Court.

Relevant Docket Entries in *Taylor* v. *Lavine.*

73 Civ. 699, [E.D.N.Y.] Annie Taylor v. Lavine etc.

DATE	PROCEEDINGS
5-17-73	Complaint filed. Summons issued.
6- 7-73	ANSWER of James M. Shuart filed.
6/18/73	By Weinstein, J,—Order dtd. 6/16/73 extending time for defts'. to answer to 6/26/73 filed.
6-27-73	ANSWER of deft Abe Lavine filed.
7-18-73	Deft Abe Lavine's answers to interrogatories filed.
8- 7-73	By WEINSTEIN, J. Order dated August 6, 1973 for a pre-trial Conference on September 11, 1973 at 9:30. FILED.
8/22/73	Answers to Interrogatories filed. (deft. J. SHUART)
8-27-73	Notice of Motion & Memorandum of law Summary Judgment in favor of Pltff. Returnable Sept 11, 1973 filed.
9-10-73	Memorandum in opposition to Pltff's motion for summary judgment filed.
9/17/73	Deft's Notice of Cross Motion to Dismiss Complaint and for Summary Judgment, ret. 9/17/73 filed. & Memorandum in Support of Motion filed.
9-17-73	Before WEINSTEIN, J. Case called on Pltff's motion for summary judgment, etc. Motion argued—Decision reserved. Letter to be submitted stipulating on the facts.
10-11-73	By WEINSTEIN, J.—Memorandum and order dtd 10-10-73 that defts are urged to re-examine the situation of pltffs & to settle order on 48 hours notice filed. (p/c mailed to attys). MM
10-24-73	Unsigned counter-order filed.

Relevant Docket Entries in Taylor v. *Lavine.*

DATE	PROCEEDINGS
10-24-73	By WEINSTEIN, J.—JUDGMENT & ORDER dtd 10-23-73 maintaining above action as a class action & granting pltffs' motion for summary judgment (as indicated—see order). Execution of this order is stayed for one week pending application to C of A for an additional stay pending final disposition of any or all appeals taken herein filed. (p/c mailed to attys). MM
10-26-73	Notice of appeal filed. (dupl. of appeal mailed to C of A. JN. & Atty)
11-23-73	Notice of appeal filed. Duplicate of appeal mailed to C of A & attys. jn MM
11-28-73	Above record certified & mailed to C. of A.
12/3/73	Acknowledgment recd and filed from the C. of A. for recpt of Index to Record on Appeal and filed.
12/14/73	By WEINSTEIN, J.—Amended Judgment and Order dated 12/14/73 filed. (see Order) P.C. mailed to the Attys.
12/14/73	Affidavit of Constance B. Margolin filed.
12-18-73	By WEINSTEIN, J.—Amended Judgment and order dtd 12-18-73 filed, to supersede judgment and order entered on 10-24-73 etc. filed.
12-21-73	Certified copy of judgment received from C of A remanding action to district court for the purpose of correcting original judgment filed.
5-28-74	Letter from Leonard S. Clark dtd 5-23-74 filed.
5-28-74	By WEINSTEIN, J.—Order dtd 5-28-74 defts requesting response of defts to request for three judge court filed on document #24. (copies mailed to attys).

Relevant Docket Entries in Taylor v. *Lavine.*

DATE	PROCEEDINGS
5-29-74	Copy of letter from Martin A. Schwartz dtd 5-22-74 filed.
5-29-74	By WEINSTEIN, J.—Order dtd 5-24-74 requesting defts to respond to motion for a three judge court filed on document #25. (copies mailed to attys as directed). MM
6/6/74	Before WEINSTEIN, J.—Case called—Pretrial conference held and concluded—Pltffs motion for a 3 judge court is granted—Order signed.
6-6-74	Letter dtd. 6-6-74 from Judge Weinstein to Judge Kaufman filed.
6-7-74	By WEINSTEIN, J.—Order dtd. 6-6-74 granting motion for 3 judge court filed. (p/c to attys) MB
6/11/74	Letter dated 6/7/74 filed from Martin A. Schwartz to J. Weinstein with annexed copy of Motion for 3 Judge Court and Memorandum of Law in Support
6-14-74	Notice to take deposition of agents of deft, Lavine filed.
6-14-74	Request for admission of facts filed.
6-18-74	Memorandum from Judge Bauman dtd 6-13-74 that argument will prooceed on 6-26-74 in S.D.N.Y. filed.
6-18-74	By WEINSTEIN, J.—Order dtd 6-14-74 directing Clerk to notify attys of hearing filed on document #31. (parties notified). MM
6-20-74	By KAUFMAN, C.J.—Order dtd 6-17-74 designating Judge Bauman, Judge Weinstein, and Judge Hays for the three judge court, and consolidating this action with *Hurley* v. *Van Lare* 72C-3423 (SDNY) for purposes of hearing and disposition filed.

DATE	PROCEEDINGS
6-20-74	By KAUFMAN, C.J.—Order dtd 6-17-74 designating Judge Arnold Bauman (SDNY) to sit in a three judge court in EDNY filed.
6-20-74	By KAUFMAN, C.J.—Copy of order dtd 6-17-74 designating Judge Weinstein to sit in a three judge court in SDNY filed.
6-20-74	By WEINSTEIN, J.—Order dtd 6-19-74 directing Clerk to notify Judge Kaufman of filing of orders re designation of three judge court. Filed. (Judge Kaufman notified as directed).
6-20-74	By Weinstein, J.—Order dtd 6-20-74 directing Clerk to provide xerox copies of above file for Judges Hays & Bauman filed.
6-25-74	By WEINSTEIN, J.—Order to show cause dtd 6-21-74 for an order granting intervention of Francesca Aloise, ret 6-26-74 at 10:30 A.M. at Foley Square before a three judge panel filed.
7/ 3/74	Reply Brief for Pltff's filed.
7-11-74	Letter from Martin A. Schwartz dtd 7-3-74 with annexed motion to strike filed.
7-11-74	Letter from Martin A. Schwartz dtd 7-8-74 with annexed supplemental affidavit filed.
7-11-74	Record on appeal received from C of A. Acknowledgment mailed to Clerk.
7-11-74	Stenographer's minutes dtd 6-26-74 filed (before Bauman).
7-11-74	Stenographer's minutes dtd 6-26-73 filed (three judge court).
7-12-74	Letter from Martin A. Schwartz dtd 7-3-74 filed.
7-12-74	Pltffs' memorandum of points and authorities and appendix filed.

DATE	PROCEEDINGS
7-12-74	Defts' memorandum of law to three-judge court filed.
7-12-74	Letter dtd. 7-11-74 from Martin A. Schwartz to Judge Weinstein filed.
7-15-74	Proceedings subsequent to remand filed.
7-15-74	Proceedings prior to remand filed.
7-15-74	Defts' memorandum of law to three-judge court filed.
7-19-74	Letter dtd. 7-16-74 from Martin A. Schwartz to Judge Weinstein filed.
7/25/74	Affidavit in Support of Pltff's motion filed.
7-30-74	Certified copy of judgment and copy of opinion received from C of A. reversing judgment of this court, etc. filed. jn
8/16/74	Unsigned Judgment and Order filed.
8/16/74	Amended Answer of Louis J. Lefkowitz filed.
8/16/74	Letter dated Aug. 8, 1974 filed from M. Schwartz to J. Weinstein.

PROCEEDINGS BEFORE THE SINGLE DISTRICT JUDGE.

Hurley* v. *Van Lare
72 Civ. 3423
S.D.N.Y.

Amended Complaint.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Class Action
72 Civ. 3423

ROSE HURLEY, individually and on behalf of her minor dependent children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Plaintiffs,

against

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State New York,

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York,

LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Defendants.

I.

PRELIMINARY STATEMENT

Plaintiff, individually, and on behalf of her minor dependent children and on behalf of all other persons similarly situated, seeks to have this court restore plaintiffs' rights which were abrogated, denied and deprived by

the defendants' enforcement of 18 N.Y.C.R.R. Sections 352.31(3)(iv) and 352.30(c) and (d) of the regulations of the State Department of Social Services and to have this court declare invalid, unconstitutional and enjoin the above-cited regulations and award retroactive benefits to all members of the class who have been aggrieved by the enforcement of these regulations. These regulations treat a man living with a woman and having no legal responsibility for her support or for the support of her children as a lodger and thereby cause a pro rata reduction in the public assistance grant that the woman and children receive from the State Department of Social Services. The regulations are challenged on the ground that they are in conflict with provisions contained in Article IV, § 2, Clause 1, Article VI, the First, Ninth and Fourteenth Amendments to the Constitution of the United States and subchapter IV of the Social Security Act, 42 U.S.C. §§ 601-609, and regulations promulgated pursuant thereto by the United States Department of Health, Education and Welfare.

II.

JURISDICTION

1. Jurisdiction is conferred on this Court by 28 U.SC. §1343(3) and (4) which provides for original jurisdiction of this Court in all suits authorized by 42 U.SC. §1983 to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress without regard to the amount in controversy.

2. Plaintiffs' action for declaratory and injunctive relief, and for retroactive rights to public assistance is authorized by:

(a) 28 U.S.C. §§ 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judgments.

(b) 42 U.S.C. § 1983 which provides for redress for the deprivation under color of law of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and laws of the United States.

III.

THREE-JUDGE COURT

3. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 since plaintiff seeks an injunction to restrain defendants, who are state officers, from the enforcement, operation and execution of 18 N.Y.C.R.R. §§ 352.31(3)(iv) and 352.30(c) and (d), of state-wide applicability, on the ground that these regulations are contrary to the Constitution of the United States.

IV.

PLAINTIFFS

4. The named plaintiff, Rose Hurley, is a citizen of the United States and of the State of New York. She is 26 years of age and is the mother of three (3) children, Doreen Hurley, John Hurley and Jamie Hurley, 10, 5, and 5 years of age respectively. Plaintiff is a resident of the City of Mount Vernon, County of Westchester, State of New York.

4a. The plaintiffs Doreen Hurley, John Hurley and Jamie Hurley are the minor dependent children of plain-

tiff Rose Hurley and are included in Rose Hurley's public assistance grant pursuant to the Federal-State Aid to Families with Dependent Children program.

5. The named plaintiff brings this action individually on her own behalf and on behalf of her minor dependent children and on behalf of all other persons similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. The members of the class similarly situated are all residents of the State of New York who are or were receiving public assistance who have had their grants reduced, terminated, suspended or denied, or who are threatened with reduction, termination, suspension or denial solely because of the enforcement of 18 N.Y.C.R.R. § 325.31(3)(iv) and § 352.30(c) and (d) of the Regulations of the New York State Department of Social Services.

6. The requirements of Rule 23(a) of the Federal Rules of Civil Procedure are complied with because:

(1) The class is so numerous that joinder of all members is impracticable;

(2) There are questions of law common to the class, i.e., the constitutional validity of 18 N.Y.C.R.R. §§ 352.31(3)(iv) and 352.30 (c) and (d);

(3) The claims of the representative parties are typical of the claims or defenses of the class, and

(4) The representative parties will fairly and adequately protect the interests of the class.

The requirement of Rule 23(b) of the Federal Rules of Civil Procedure is complied with because the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and declaratory relief with respect to the class as a whole.

Additionally, there are questions of law and fact common to the members of the class which predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

VI.

Defendants

7. Defendant Barry Van Lare was the New York State Acting Commissioner of Social Services at the time the State Fair Hearing decision was rendered. He is being sued individually and in his official capacity.

8. Defendant Abe Lavine is the New York State Commissioner of Social Services. He is being sued individually and in his official capacity.

9. Defendant Louis P. Kurtis is the Commissioner of Social Services for the County of Westchester. He is being sued individually and in his official capacity.

10. The foregoing defendants are charged with the administration, enforcement, operation and execution of New York State's public assistance program and with the enforcement of 18 N.Y.C.R.R. §§ 352.31(3)(iv) and 352.30 (c) and (d) of the Regulations of the State Department of Social Services which is herein challenged as being in conflict with the Constitution of the United States.

VII.

Factual Allegations

11. Plaintiff and her three minor children are citizens of the United States and residents of Mount Vernon, New York, and reside together at 90 Brookside Avenue, Mount Vernon, New York. Plaintiff has been living separate and apart from her husband since 1967 and has not seen, heard from, or had any contact with him since 1967 and does not know his whereabouts.

12. Plaintiff and her three minor children are receiving public assistance pursuant to the federal-state AFDC program.

13. A male friend stayed with plaintiff during the months of November and December, 1970, and January and February, 1971.

14. No financial support or contributions were made to the plaintiff by her friend nor was her friend under any legal obligation to provide financial support or assistance to plaintiff or her three children.

15. During the months of November and December, 1970, and January and February, 1971, the Westchester County Department of Social Services deducted $35 per month from plaintiff's recurring grant because of the presence of a "lodger" in plaintiff's household. No explanation was offered by the agency as to the method of computing the $35 per month reduction.

16. Plaintiff's rent was $150 per month during these four months. Plaintiff's rent was not increased by the presence of her male friend.

17. Title 18 N.Y.C.R.R. § 352.31(3)(iv) provides:

> When a female recipient is living with a man to whom she is not married, . . . [and] when the man is unwilling to assume responsibility for the woman or her children and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with Section 352.30 (c).

Section 352.30(c) of the Regulations of the State Department of Social Services provides:

> When an applicant or recipient wilfully fails or refuses to comply with the requirements of Part 385 of this Title, the needs of the family shall be determined as if he were a member of the family, however, the grant shall be provided on a pro rata basis for the eligible family members only.

Section 352.30(d) of the Regulations of the State Department of Social Services provides:

> A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. . . . In the event a lodger does not contribute at least $15 per month, the family's shelter allowance, including fuel for heating, shall be a pro rata share of the regular shelter allowance.

18. On November 12, 1970, plaintiff requested a State Fair Hearing and on March 22, 1971, a State Fair Hearing was held pursuant to 18 N.Y.C.R.R. Part 369 in White Plains, New York, for the purpose of reviewing the reduction of the plaintiff's grant by the Westchester County Department of Social Services.

19. A decision was rendered on September 20, 1971, by the New York State Department of Social Services. This decision upheld the determination of the Westchester County Department of Social Services reducing plaintiff's grant because of the presence of a lodger in the home, except that the decision held that the Department should have deducted $30 per month instead of $35 per month from plaintiff's grant. In his "Decision After Fair Hearing" the Acting State Commissioner found that:

> (1) Appellant and her three children are in receipt of aid to dependent children.
>
> (2) During the months of November and December, 1970, and January and February, 1971, the agency deducted $35 a month from appellant's recurring grant

because of the presence of a "lodger" in appellant's household. No explanation was offered by the agency as to the method of computation of $35 a month.

(3) Appellant's rent is $150 a month.

(4) A male friend of appellant's resided with her during the months of November and December, 1970, and January and February, 1971.

(5) No contribution was made to the appellant by the friend.

In addition, it was found that:

The record establishes that the man residing with appellant was not willing to assume responsibility for the appellant or her children of which he is the acknowledged or adjudicated father. In addition, no contribution is made by the lodger to the appellant.

The decision of the State Fair Hearing is attached hereto and made a part hereof as Exhibit "A".

19. Despite numerous requests by plaintiff's attorney commencing on or about October 1, 1971, defendants did not provide plaintiff's attorney with a copy of the transcript of the Fair Hearing until on or about January, 1972.

20. As a consequence of Sections 352.31(3)(iv) and 352.30 (c) and (d) of the Regulations of the State Department of Social Services, the plaintiff's public assistance grant was reduced by $30 each month for a period of four months or a sum of $120. Furthermore, plaintiff and her three minor children and all other persons similarly situated have suffered and will continue to suffer grave and irreparable harm, injury, loss and damage through the lack of adequate funds to purchase those necessities requisite for a minimum standard of living and health and will suffer

grave and irreparable harm, injury, loss and damage by not being allowed to freely associate with whomever they please in the privacy of their own home.

21. Plaintiff wishes to associate with and have her male friend reside with her at her place of residence. However, she is prevented from doing so because she fears her public assistance grant will be reduced as it was in the past by the enforcement of Title 18 N.Y.C.R.R. §§ 352.31(3)(iv) and 352.30(c) and (d). If she associates with her male friend and allows him to reside with her, the grant to herself and her children will be reduced in accord with Title 18 N.Y.C.R.R. § 352.30(3)(iv) and she and her family will suffer grave and irreparable harm to their health, safety and well being.

CAUSE OF ACTION

22. Title 18, Section 352.31 of the Regulations of the Department of Social Services of the State of New York provides *inter alia*:

(a)(3) When a female or recipient is living with a man to whom she is not married, other than on an occasional basis, his available income and resources shall be applied in accordance with the following . . .

(iv) when the man is unwilling to assume responsibility for the woman or her children and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(c)[d].

Section 352.30(c) of the regulation of the State Department of Social Services provides:

When an applicant or recipient wilfully fails or refuses to comply with the requirements of Part 385 of

this Title, the needs of the family shall be determined as if he were a member of the family, however, the grant shall be provided on a pro-rata basis for the eligible family members only.

Section 352.30 (c) of the regulations of the State Department of Social Services provides that:

A non-legally responsible relative or related person in the household who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating shall be a pro rata share of the regular shelter allowance.

23. 45 C.F.R. § 203.1 provides:

(a) A state plan for aid and services to needy families with children under Part A of Title IV of the Social Security Act, to be approved under section 402 of such Act (42 U.S.C. 602), must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive

parent and is legally obligated to support the child under state law of general applicability, which requires stepparents to support stepchildren to the same extent thta natural or adoptive parents are required to support their children.

(b) The inclusion in the family, or the presence in the home, of a 'substitute parent' or 'man-in-the-house' or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibilty or for assuming the availability of income by the State . . . [I]n the consideration of all income and resources in establishing financial eligibility and the amount of assistance payment only such income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in the absence of proof of actual contribtuions. 45 C.F.R. § 203.1 33 Fed. Reg. 11290.

24. That 18 N.Y.C.R.R. §§ 352.31(3)(iv) and 352.30(c) and (d) are inconsistent with and in conflict with 42 U.S.C. § 601-610 and the federal regulations promulgated pursuant thereto, i.e., 45 C.F.R. § 203.1. 42 U.S.C. § 602(a)(10) provides *inter alia* "A state plan for aid and services to needy families with children must provide . . . aid to families with dependent children shall be furnished with reasonable promptness to *all eligible individuals* [Emphasis added]." The New York regulations are therefore unconstitutional in violation of the Supremacy Clause of the United States Constitution, Article IV, § 2, Cl. 1.

25. That the foregoing New York State regulatory scheme of the Department of Social Services arbitrarily

and irrationally creates two classes of equally needy families in violation of the due process, equal protection, and privileges and immunities clauses of the Fourteenth Amendment to the United States Constitution. One class is composed of needy families who are fully eligible to receive public assistance because no man is a "lodger" in the household. Another class is composed of needy families who are otherwise fully eligible to receive public assistance but will receive a reduced amount of assistance because a man who is not legally related or obligated to and in fact does not monetarily support the mother and children is determined to be a "lodger" in the household. families who are otherwise fully eligible to receive public assstance but will receive a reduced amount of assistance because a man who is not legally related or obligated to and in fact does not monetarily support the mother and children is determined to be a "lodger" in the household.

26. That the foregoing New York State regulatory scheme of the Department of Social Services creates an arbitrary and irrational distinction among male and female lodgers by causing a pro rata reduction in the grant only where male lodgers are present and is invidiously discriminatory against female welfare recipients who choose, permit or allow a male to become a lodger in their household and this is in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

27. By reducing plaintiff's public assistance grant through the enforcement of 18 N.Y.C.R.R. §§ 352.31(3)(iv) and 352.30(c) and (d), i.e., solely because the Department of Social Services determined that plaintiff had a male lodger in her household defendants have violated plaintiff's rights of privacy and freedom of association as guaranteed by the First and Fourteenth Amendments

to the United States Constitution and the Ninth Amendment to the United States Constitution.

28. That 18 N.Y.C.R.R. §§ 352.31(3)(iv) and 352.30(c) and (d) irrationally create a conclusive presumption that a man determined to be a "lodger" in the plaintiff's household has the ability to provide and in fact provides the family with income thus enabling the Department of Social Services to reduce the plaintiff's grant. This conclusive presumption is arbitrary and irrational and is a violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, plaintiffs pray on behalf of themselves and all others similarly situated that this Court:

1. Assume jurisdiction of this action and convene a three-judge court pursuant to 28 U.S.C. §§ 2281 and § 2284.

2. Issue a permanent injunction enjoining defendants, their employees, officers, agents, successors and all other persons in active concert and participation with them from enforcing 18 N.Y.C.R.R. § 352.31(3)(iv) and § 352.30(c) and (d).

3. Issue a permanent injunction mandating defendants, their employees, officers, agents, successors and all other persons in concert and participation with them to afford plaintiffs and all others similarly situated their right to the retroactive public assistance that defendants have wrongfully deducted pursuant to 18 N.Y.C.R.R. §§ 352.31 (3)(iv) and 352.30(c) and (d).

4. Issue a final judgment declaring 18 N.Y.C.R.R. §§ 352.31(3)(iv) and 352.30(c) and (d) unconstitutional and in violation of the privileges and immunities, due process, and equal protection clauses of the Fourteenth

Amendment to the United States Constitution, the freedom of association and right of privacy guaranteed by the First and Ninth Amendments to the United States Constitution, the supremacy clause, Article VI of the United States Constitution and the Federal Social Security Act, 42 U.S.C. § 601 set seq. and the regulations promulgated thereunder by the United States Department of Health, Education and Welfare.

5. Declare this action to be a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

6. Award plaintiffs their costs, disbursements and attorneys fees herein.

7. Award plaintiffs such other, further and different relief as to this Court may appear just and equitable.

Dated: August 28, 1972, Mount Vernon, N. Y.

Respectfully submitted,

JEROLD S. SLATE
THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY
JEROLD S. SLATE, Of Counsel
MARTIN A. SCHWARTZ, Of Counsel
Attorneys for Plaintiff

(Verified by Rose Hurley, August 28, 1972.)

Notice of Motion for an Order Determining Class Action and Summary Judgment on Behalf of Rose Hurley.

[SAME TITLE]

TO THE DEFENDANTS:

PLEASE TAKE NOTICE that upon all the papers heretofore filed with the Court and more particularly upon the amended verified complaint herein upon the plaintiff's affidavit, upon the affidavit of Jerold S. Slate, Esq., and the exhibits attached and annexed thereto, plaintiffs will move this Court at a Motion Term, to be held at the United States Courthouse in Room 506, Foley Square, New York, New York, on the 31 day of January, 1973, at 10:00 a.m. or as soon thereafter as counsel can be heard:

1. For an order determining the within action to be a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

The grounds of this motion, as are more fully set forth in plaintiff Hurley's memorandum of points and authorities submitted in this action, are that:

(a) The class is so numerous that joinder of all members is impracticable;

(b) There are questions of law and fact common to the class;

(c) The claim of the representative plaintiffs is typical of the claims of the class and it can reasonably be expected that defendants will interpose identical defenses to such claim;

(d) The Legal Aid Society of Westchester County will fairly and adequately protect the interests of the class and;

(e) Defendants have acted and refused to act on grounds generally applicable to the class thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

2. For an order pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting final summary judgment in favor of plaintiffs and the class which they represent and against the defendants for the declaratory and injunctive relief, including retroactive welfare payments, prayed for in paragraphs 2, 3 and 4 of the Wherefore Clause of the Amended Verified Complaint, based on the invalidity and unconstitutionality of 18 N.Y.C.R.R. 352.31(3)(IV) and 352.30(c) and (d).

The grounds of this motion, as are more fully set forth in the memorandum of points and authorities submitted in support of this motion, are that there is no genuine issue of material fact and plaintiffs are entitled to judgment as a matter of law in that 18 N.Y.C.R.R. §§ 352.31(3)(IV) and 352.30(c) and (d) are invalid and unconstitutional under the United States Constitution, Article IV, § 2, Clause 1, Article VI and the First, Ninth and Fourteenth Amendments to the United States Constitution, and in conflict with subchapter IV of the Social Security Act, 42 U.S.C. §§ 601-609 and the regulations promulgated pursuant thereto by the United States Department of Health, Education and Welfare.

Plaintiffs further move that if summary judgment is not rendered in plaintiffs' favor for all of the relief prayed for herein and a trial is necessary, that the Court, at the hearing on the motion, by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts are actually and in good faith controverted,

and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just.

PLEASE TAKE FURTHER NOTICE that any opposing affidavits and answering memoranda must be served upon counsel for plaintiffs at least three days before the return date of this motion.

Dated: January 16, 1973, Yonkers, New York.

Respectfully submitted,

/s/ THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY
JEROLD S. SLATE, of Counsel
MARTIN A. SCHWARTZ, of Counsel

Affidavit of Rose Hurley in Support of Motion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF WESTCHESTER } ss.:

ROSE HURLEY, being duly sworn, deposes and says that:

1. I reside at 90 Brookside Avenue, Mount Vernon, New York, with my three (3) children, Doreen Hurley, Jamie Hurley and John Hurley, ten (10), five (5), and five (5) years of age respectively.

2. I make this affidavit on behalf of myself, my three minor dependent children who are plaintiffs herein and on behalf of all other plaintiffs similarly situated in support of plaintiffs' motion for a class action determination. I have personal knowledge of all of the facts set forth herein.

3. The plaintiffs Doreen Hurley, Jamie Hurley and John Hurley are my minor dependent children and are included in my public assistance grant pursuant to the Federal-State Aid to Families with Dependent Children program.

4. I have been living separate and apart from my husband since 1967 and have not seen, heard from or had any contact with him since 1967 and do not know his whereabouts.

5. My children and I are currently receiving public assistance pursuant to the federal-state AFDC program.

6. A male friend of mine stayed with me during the months of November and December, 1970, and January and February, 1971.

7. No financial support or contributions were made to me or my children or on our behalf by my male friend and he was not under any legal obligation to provide financial support or assistance to me or my three children.

8. During the months of November and December of 1970, and January and February of 1971, the Westchester County Department of Social Services deducted $35 per month from my recurring grant because of the presence of a "lodger" in my household. No explanation was offered by the agency as to the method of computing the $35 per month reduction.

9. My monthly rent prior to and during the four month period that my public assistance grant was reduced was $150 per month. My monthly rental was not increased by the presence of my male friend in my home.

10. During this four month period I had to use money that I would have otherwise used for necessary food and clothing for myself and my children for my rent. During this four month period my children and I suffered irreparable injury because we did not have proper food or clothing.

11. On November 12, 1970, I requested a State Fair Hearing and on March 22, 1971, a State Fair Hearing was held pursuant to 18 N.Y.C.R.R. Part 369 in White Plains, New York, for the purpose of reviewing the reduction of my public assistance grant by the Westchester County Department of Social Services. A decision was rendered on September 20, 1971, by the New York State Department

of Social Services. This decision upheld the determination of the Westchester County Department of Social Services reducing my grant because of the presence of a lodger in my home, except that the decision held that the Department should have deducted $30 per month instead of $35 per month from my grant. A copy of the decision is attached hereto.

12. In his "Decision After Fair Hearing" the Acting State Commissioner Barry Van Lare found that:

1) Appellant and her three children are in receipt of aid to dependent children.

2) During the months of November and December 1970, and January and February 1971, the agency deducted $35 a month from appellant's recurring grant because of the presence of a "lodger" in appellant's household. No explanation was offered by the agency as to the method of computation of $35 a month.

3) Appellant's rent is $150 a month.

4) A male friend of appellant's resided with her during the months of November and December 1970, and January and February 1971.

5) No contribution was made to the appellant by the friend.

In addition, it was found that:

> The record establishes that the man residing with appellant was not willing to assume responsibility for the appellant or her children of which he is not the acknowledged or adjudicated father. In addition, no contribution is made by the lodger to the appellant.

A copy of the Fair Hearing Decision is annnexed hereto as Exhibit "A".

13. The primary reason my male friend is not presently residing with me is because of the previous enforcement of 18 N.Y.C.R.R. 352.31(IV) and 352.30(c) and (d) so as to reduce my welfare allowance. I still desire to see my male friend and have him visit me and stay with me at my house on more than an occasional basis. However, I feel threatened and fear that if I allow my friend to stay with me the Department of Social Services of the State of New York will enforce Title 18 N.Y.C.R.R. § 352.31(IV) and § 352.30 (c) and (d) as they have done in the past and will reduce my public assistance grant. The reduction of my welfare grant causes grave and irreparable harm to the health, safety and well being of myself and my three minor dependent children because of a lack of adequate funds to purchase those necessities requisite for a minimum standard of living and health. I and my children are presently suffering grave and irreparable harm, injury, loss and damage by not being allowed to freely associate with my male friend.

WHEREFORE, plaintiffs respectfully pray that this Court grant their motion for a class action determination and summary judgment.

(Sworn to by Rose Hurley, January 16, 1973.)

Decision After Fair Hearing, Exhibit "A" to Hurley Affidavit.

In the Matter of the Appeal of

ROSE HURLEY

from a determination by the Westchester County Department of Social Services (hereinafter called the agency)

A fair hearing was held at White Plains, New York, on March 22, 1971, before Edward Hubbard, Hearing Officer, at which the appellant, the appellant's representative and representatives of the agency appeared. The appeal is from a determination by the agency relating to the adequacy of aid to dependent children, in that the agency had deducted $35 a month from the appellant's budget for the month of November, and December, 1970, and January and February of 1971. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

(1) Appellant and her three children are in receipt of aid to dependent children.

(2) During the month of November and December, 1970, and January and February, 1971, the agency deducted $35 a month from appellant's recurring grant because of the presence of a "lodger" in appellant's household. No explanation was offered by the agency as to the method of computation of $35 a month.

(3) Appellant's rent is $150 a month.

(4) A male friend of appellant's resided with her during the months of November and December, 1970, and January and February, 1971.

(5) No contribution was made to the appellant by the friend.

Section 352.31(3)(iv) of the Regulations of the State Department of Social Services provides that when a female recipient is living with a man to whom she is not married . . . and when the man is unwilling to assume responsibility for the woman or her children and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with Section 352.30(c) of the Regulations.

Section 352.30(c) of the Regulations of the State Department of Social Services provides that in the event a lodger does not contribute at least $15 a month, the family shelter allowance including fuel for heating, shall be a prorata share from the shelter allowance.

The record establishes that the man residing with appellant was not willing to assume responsibility for the appellant or her children and there are no children of which he is the acknowledged or adjudicated father. In addition, no contribution is made by the lodger to the appellant. Accordingly, the agency should have deducted $30 a month from the cost of shelter as his prorata share of rent.

DECISION: The determination of the agency is reversed. The agency is directed to recompute the appellant's grant for the months involved in accordance with the foregoing and to issue a grant in the amount of the difference between what the appellant should have received, and that which she did receive. The agency is further directed to report to the Area 5 Office of the State Department of Social Services on its action taken pursuant to this decision in accordance with the provisions of Section 84.19 of the Rules of the State Board of Social Welfare.

DATED: Albany, New York

Sep 20 1971

BARRY VAN LARE
Acting Commissioner

Statement Pursuant to General Rule 9-G of the Rules of the Southern District of New York in Support of Motion for Summary judgment.

[SAME TITLE]

The material facts as to which it is contended that there is no genuine issue to be tried are as follows:

1. Plaintiff Rose Hurley and her three children are presently in receipt of the federally-state funded public assistance program of Aid to Families with Dependent Children (AFDC).

2. During the months of November and December 1970, and January and February 1971, plaintiff Rose Hurley and her three minor dependent children were receiving AFDC from the Westchester County Department of Social Services and they have continued to receive such AFDC through the commencement of this action.

3. During the months of November and December 1970, and January and February 1971, the public assistance grant to plaintiff Rose Hurley and her three children was reduced by $35 per month because of the presence of a male friend in their home.

4. No financial support or contribution was made to plaintiff or her children or on her behalf by her male friend and he was not under any legal obligation to provide financial assistance or support to her or her three children.

5. Plaintiff's monthly rental prior to and during the four month period that her public assistance was reduced was $150 per month. Her monthly rental was not increased by the presence of her male friend in her home.

Statement Pursuant to General Rule 9-G of the Rules of the Southern District of New York in Support of Motion for Summary Judgment.

6. A New York State Fair Hearing was held on March 22, 1971, for the purpose of reviewing the reduction of the plaintiff's grant.

7. A decision was rendered on September 20, 1971, by the New York State Department of Social Services.

8. In his "Decision After Fair Hearing" the Acting State Commissioner Barry Van Lare found that:

1) Appellant and her three children are in receipt of Aid to Dependent Children.

2) During the months of November and December 1970, and January and February 1971, the agency deducted $35 a month from appellant's recurring grant because of the presence of a "lodger" in appellant's household. No explanation was offered by the agency as to the method of computation of $35 a month.

3) Appellant's rent is $150 a month.

4) A male friend of appellant's resided with her during the months of November and December 1970, and January and February 1971.

5) No contribution was made to the appellant by the friend.

In addition, it was found that:

The record establishes that the man residing with appellant was not willing to assume responsibility for the appellant or her children of which he is not the acknowledged or adjudicated father. In addition, no contribution is made by the lodger to the appellant.

Statement Pursuant to General Rule 9-G of the Rules of the Southern District of New York in Support of Motion for Summary Judgment.

9. The only reason plaintiff's male friend is not presently residing with her is because of the previous enforcement of, and threatened future enforcement of 18 N.Y.C.R.R. 352.31(IV) and 352.30(c) and (d) which would reduce her public assistance grant. Plaintiff still desires to see her male friend and have him visit her and stay with her at her house on more than an occasional basis. However, plaintiff feels threatened and fears if she allows her friend to stay with her the Department of Social Services of the State of New York will enforce Title 18 N.Y.C.R.R. § 352.31(IV) and § 352.30(c) and (d) as they have done in the past and will reduce her public assistance grant.

Dated, January 16, 1973

Yonkers, New York

Respectfully submitted,

THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY
Jerold S. Slate, of Counsel
Martin A. Schwartz, of Counsel
Attorneys for Plaintiffs

Notice of Motion to Intervene, for Preliminary Injunction and Class Action Determination on Behalf of Phyllis D'Alessio.

[SAME TITLE]

TO THE DEFENDANTS:

PLEASE TAKE NOTICE, that Phyliss D'Alessio, Cathy Lenore D'Alessio and Christine Marie D'Alessio, the proposed plaintiff-intervenors, will bring on for hearing before the United States District Court in room 705 of the United States Courthouse, Foley Square, New York, New York on March 9, 1973 at 9:00 a.m. or as soon thereafter as counsel may be heard, a motion:

1. For an order permitting Phyllis D'Alessio, Cathy Lenore D'Alessio and Christine Marie D'Alessio to intervene in this action pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure as party plaintiffs.

The grounds of this motion, as are more fully set forth in the proposed intervenors-plaintiffs' complaint, the affidavit in support of this motion and in the memorandum of points and authorities submitted in support of this motion, are that:

The proposed intervenors are members of the class purported to be represented by the named plaintiffs and that the proposed intervenors' claims and the claims of the named plaintiffs contain an identical question of law, i.e., the constitutionality and validity of 18 N.Y.C.R.R. 352.31(3)(iv) and 352.30(c) and (d). Permitting the applicants to intervene will not unduly delay or prejudice the adjudication of the rights of the original parties.

2. A preliminary injunction pursuant to rule 65 of the Federal Rules of Civil Procedure restraining defendants

Notice of Motion to Intervene, for Preliminary Injunction and Class Action Determination on Behalf of Phyllis D'Alessio.

Abe Lavine and Louis P. Kurtis, their successors, agents and employees and all persons in active concert and participation with them, from reducing the proposed plaintiff-intervenors public assistance grant based on the enforcement of 18 N.Y.C.R.R. 352.31(3)(iv) and 352.30(c) and (d) pending the final determination of this action.

The grounds of this motion, as are more fully set forth in the proposed intervenors' verified complaint, in the proposed intervenor's affidavit annexed hereto, and in the proposed intervenors' memorandum of points and authorities submitted in support of this motion are that:

The enforcement of 18 N.Y.C.R.R. 352.31(3)(iv) and 352.30(c) and (d) so as to reduce intervenors' public assistance will cause intervenors grave and irreparable injury, and that intervenors have established probable success of their claim that these regulations are invalid and unconstitutional.

3. For an order determining the within action to be a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

The grounds of this motion, as are more fully set forth in the named plaintiffs' memorandum of points and authorities submitted in this action, are that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claim of the representative plaintiffs are typical of the claims of the class and it can reasonably be expected that defendants will interpose identical defenses to such claims; (4) The Legal Aid Society of Westchester County will fairly and adequately protect the interests of the class, and; (5) defendants have acted and refused to act on

Affidavit of Phyllis D'Alessio.

grounds generally applicable to the class thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

PLEASE TAKE FURTHER NOTICE, that opposing affidavits and answering memoranda must be served upon counsel for plaintiffs at least three days before the return day of this motion.

Dated: February 5, 1973, Yonkers, New York

Respectfully submitted,

MARTIN A. SCHWARTZ
The Legal Aid Society of
Westchester County
Jerold S. Slate, of Counsel
Martin A. Schwartz, of Counsel
Attorneys for Intervenors-Plaintiffs

Affidavit of Phyllis D'Alessio in Support of Motion.

[SAME TITLE]

COUNTY OF WESTCHESTER }
STATE OF NEW YORK } ss.:

PHYLLIS D'ALESSIO being duly sworn deposes and says:

1. That I am one of the proposed intervenors in the above captioned action. I make this affidavit in support of my motions to intervene for preliminary injunction and class action determination in the above captioned action. I have personal knowledge of the facts set forth herein.

2. My two minor children and I are citizens of the United States and residents of Mount Vernon, New York, and reside together at 40 South West Street, Mount Vernon, New York. I was married in 1962 and have not seen, heard or been in contact with my husband since July 1965 and do not know where he presently can be located.

3. I am thirty (30) years of age and reside with my two minor children, Cathy Lenore D'Alessio age 9½, and Christine Marie D'Alessio age 8, and my male friend, Harry Edward Mottola, who is forty-nine years of age.

4. My two minor children and I are receiving public assistance pursuant to the federal-state AFDC program and have been receiving such assistance for approximately the last 6½ years.

5. Over the past six to seven years I have been hospitalized approximately twelve times and have undergone surgical operations for a herniated disc removal, spinal fusion, several fibris tumor operations on both feet and a hysterectomy due to a cervical tumor.

6. My male friend has stayed with my children when I was in the hospital and has stayed with me each time I was released from the hospital during the period of my convalescence and has stayed with my children and me for additional periods including Christmas and Easter holidays.

7. Prior to my residence at 40 South West Street, Mount Vernon, New York, I resided at 117 North Terrace Avenue, Mount Vernon, New York and 324 East 4th Street, Mount Vernon, New York. During all of the time that I resided in Mount Vernon, my male friend resided with me

for more than two months each year. We have resided together for various times in the last 6 years. During the months of December 1972 and January 1973, Mr. Mottola resided with me continuously. Mr. Mottola presently resides with my children and myself and we intend to reside together in the future. Mr. Mottola and I intend and desire to be married.

8. I have not been able to marry Mr. Mottola because I have been unable to obtain a divorce from my husband. I have made efforts to obtain a divorce through The Legal Aid Society of Westchester County, but my file was closed because I was not able to pay the divorce court costs and fees, and because the Westchester County Department of Social Services would not authorize payment for such costs and disbursements. (See Exhibits A, B, C and D of proposed intervenors' verified complaint).

9. On each occasion that I was in the hospital and was convalescing, my male friend took care of my children and me; did shopping for food; washed the family's clothes; cooked the family's meals; prepared the children for school in the morning, cleaned the house and cared for the family in the evening. I was not able to carry out these family and household functions because of my illness and convalescence.

10. During the time I resided at 324 East 4th Street, Mount Vernon, New York, the presence of my male friend in the D'Alessio's household was necessary because I resided in a high crime area and several attacks were made on my children.

11. Over the past several years I have come to regard my male friend as a husband and my children call him "daddy".

12. My male friend is forty-nine years of age and is presently unable to work because he had a prostate infection and now has "pinolitis cyst" and stomach problems. My friend supports himself by performing various jobs, such as a truck driver's helper, locker room attendant and a golf caddy. He has also received unemployment insurance. At no time has he received any public assistance, or financial support from plaintiffs. He is not legally related to me or my children and is under no legal obligation to support us, and in fact has provided no financial support for us.

13. My present public assistance grant is $336 and I have received a letter from the County of Westchester Department of Social Services dated January 22, 1973 indicating that my public assistance grant will be reduced to $292.40 effective February 1, 1973. The letter provides that:

> "Quality control reports of 1Ø/15/72 [sic] indicated that Mr. Mattrola [sic] resides with you and your family. Therefore we are pro-rating your rent ¾ of $175 = $131.40." See Exhibit "E".

14. On January 30, 1973 I received a letter from the Department of Social Services of Westchester County stating:

> "Dear Mrs. D'Alessio:
>
> We are sending you an additional check of $43.60 in addition to your regular recurring grant of $292.40 for the month of February.
>
> As of March 1, 1973 we will be sending you just $292.40 per month. Perhaps this can give you sometime to make the necessary adjustments." See Exhibit "F".

15. The health, safety and well being of my children and myself would be imminently endangered if my public assistance grant is reduced. Our rights of privacy and freedom to associate with our friend in our household is being penalized, jeopardized, infringed and restricted by the Westchester County Department of Social Services by the enforcement of 18 N.Y.C.R.R. §§ 352.31(3)(iv) and 352.30(c) and (d).

16. My current rent is $175 and has been the same since October 1, 1971. The amount of rent that I pay is not and has not been increased by the presence of my friend in my household. My present apartment contains two bedrooms which is the minimum for myself and two daughters.

WHEREFORE, I respectfully pray that this Court grant my motions to intervene, for a preliminary injunction and class action determination.

(Sworn to by Phyllis D'Alessio, February 6, 1973.)

Correspondence Regarding Matrimonial Action, Exhibits "A", "B", "C" and "D" to D'Alessio Affidavit.

June 12th, 1969

Mr. Morelli
Department of Social Services
9 South First Avenue
Mt. Vernon, New York

Dear Mr. Morelli:

Re: Phyllis D'Alessio

Mrs. D'Alessio has informed me that you would like a breakdown of the fees that will be necessary in pursuing her divorce action. The fees that will be incurred are as follows:

a. $150.00 ..... This sum is for the necessary cost of publishing the summons in the newspaper.

Under the Domestic Relations Law as it now exist, the summons must be served in one of two ways, either personally, or if the husband cannot be found, by publishing the summons in the newspaper. In Mrs. D'Alessio's case her husband has been absent for some time, and since we cannot locate him, we have no alternative but to publish the summons.

b. $5.00 ..... Securing an index number.

c. $20.00 ..... Placing the matter on the Court calendar.

d. $15.00 ..... The cost of the transcript with which it is necessary to secure the judgment.

Exhibit "A" to D'Alessio Affidavit.

In Mrs. D'Allessio's case we have secured the Court's permission to proceed as a poor person in which case the County will pay the costs of items b, c, & d. As far as item "a" is concerned, in speaking with the County attorney, I was advised to try to secure this amount from the Westchester County Department of Social Services as the County does not have provisions for paying the same.

Accordingly, I am requesting of the Department of Social Services the sum of $150.00 as aforesaid to cover the cost of publication.

Should there be any questions, please do not hesitate to call this office or contact the undersigned.

Very truly yours,

Michael S. La Bush
Attorney at Law

MSL:ksb

Exhibit "B" to D'Alessio Affidavit.

COUNTY OF WESTCHESTER

DEPARTMENT OF PUBLIC WELFARE

DIVISION OF FAMILY AND CHILD WELFARE

9 SOUTH FIRST AVENUE, MOUNT VERNON, N. Y. 10550

Tel. 664-4234

EDWIN G. MICHAELIAN
County Executive

LOUIS P. KURTIS
Commissioner
JOHN J. ALLEN
Director

June 16, 1969

Michael S. La Bush, Esq.
Legal Aid Society of Westchester
County
City Hall
Mount Vernon, New York

Re: Mrs. Phyllis D'Alessio

Dear Mr. La Bush:

This is to acknowledge your letter dated June 12, 1969, regarding the above named.

This letter has been referred to Mr. Charles White, Supervisor of Legal Services, to determine which of the requested fees shall be authorized by Westchester County Department of Social Services. Upon receipt of an answer, we shall notify you when same are authorized to Mrs. D'Alessio.

Very truly yours,

MADELINE T. CARTER
Mrs. Madeline T. Carter
District Supervisor

MTC:BRR
CC: Mr. Charles White

Exhibit "C" to D'Alessio Affidavit

December 16, 1969

Mrs. Madeline T. Carter, Dist. Supervisor
Division of Family and Child Welfare
9 South First Avenue
Mount Vernon, New York 10550

re: Mrs. Phyllis D'Alessio
Our file No. WH 2083 M

Dear Mrs. Carter:

I am enclosing herewith photostatic copy of a letter which I received from you on June 16, 1969 with reference to the above named person.

I have not received any further word from you as to the outcome of your request for assistance for Mrs. D'Alessio's publication expenses for her divorce action.

I would appreciate hearing from you.

Very truly yours,

Michael S. La Bush

MSL:fb
enclosure

Exhibit "D" to D'Alessio Affidavit

July 20, 1970

Mrs. Phyllis D'Alessio
324 East Fourth Street
Mount Vernon, New York

re: D'Alessio v. D'Alessio
Our file No. WH 2083

Dear Mrs. D'Alessio:

We have been unable to obtain the necessary funds from the Division of Social Services to cover disbursements to be incurred in the prosecution of your divorce action.

Will you please let us know if you are able to pay for the costs so that we can know what to do with your file.

Very truly yours,

Frances Berger
Secretary

Notice of Intent to Change Public Assistance Status, Exhibit "E" to D'Alessio Affidavit.

EDWIN G. MICHAELIAN
County Executive

LOUIS P. KURTIS
Commissioner
JOHN J. ALLEN
Director

COUNTY OF WESTCHESTER

DEPARTMENT OF SOCIAL SERVICES

DIVISION OF FAMILY AND CHILD SOCIAL SERVICES

NOTICE OF INTENT TO CHANGE PUBLIC ASSISTANCE STATUS

Phyllis D'Alessio
40 S. West Street
Mt. Vernon, New York

Category and
Case No.: F-015835

Date: 1/22/73

This is to advise you that this department intends to

( ) Discontinue
(x) Reduce from $336.00 to $292.40 your Public Assistance
( ) Suspend

grant on 2/1/73 for the following reasons(s):
(proposed date)

Quality control reports of 1Ø/15/72 indicates that Mr. Mattrola resides with you and your family. Therefore we are pro-rating your rent ¾ of 175 = 131.40.

You may have a conference at the department address noted by the number at the bottom of this page to review

Notice of Intent to Change Public Assistance Status, Exhibit "E" to D'Alessio Affidavit.

your case at any time before the proposed date of change in the status of your grant.

R. Goldfinger RG — 1/22/73
(Signed) — (Date)

RIGHT TO A FAIR HEARING

If you believe the status of your assistance should not be changed, you may request a state fair hearing by telephoning 212-488-6550, or by writing to Fair Hearing Section, New York State Department of Social Services, 1450 Western Avenue, Albany, New York 12200. If you request a fair hearing, a notice will be sent to you informing you of the time and place of your hearing. At the hearing, you, your attorney or other representative will have an opportunity to present relevant written and oral evidence to demonstrate why the status of your assistance should not be changed, as well as an opportunity to question any persons who appear at the hearing and present evidence against you. If you request a fair hearing before the date proposed for the change in the status of your assistance, you will continue to receive your assistance unchanged, until the fair hearing decision is issued.

(2 copies to recipient)
(1 copy to Albany)
(1 copy to Mr. Dravis)
(1 copy to file)

Memorandum from Rachel Goldfinger to Phyllis D'Alessio, Exhibit "F" to D'Alessio Affidavit.

1/30/73

Dear Mrs. D'Alessio,

We are sending you an additional check of $43.60 in addition to your regular recurring grant of $292.40 for the month of February. As of March 1, 1973 we will be sending you just $292.40 per month. We hope this can give you some time to make the necessary adjustments.

Very truly your,

(Mrs.) RACHEL GOLDFINGER
(Inc. Maint Line Sup)

Notice of Motion to Intervene and for Preliminary Injunction on Behalf of Loretta Clark.

[SAME TITLE]

To the Defendants:

Please take notice, that Loretta Clark, individually and on behalf of her minor children, will bring on for hearing before the United States District Court in room 705 of the United States Courthouse, Foley Square, New York, New York on April 2, 1973 at 9:00 a.m. or as soon thereafter as counsel may be heard, a motion:

1. For an order permitting Loretta Clark to intervene in this action pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure as party plaintiffs.

The grounds of this motion, as are more fully set forth in the proposed intervenor-plaintiffs' complaint, the affidavit in support of this motion are that:

The proposed intervenors are members of the class purported to be represented by the named plaintiffs and that the proposed intervenors' claims and the claims of the named plaintiffs contain an identical question of law, i.e., the constitutionality and validity of 18 N.Y.C.R.R. 352.31(3)(iv) and 352.30(c) and (d). Permitting the applicants to intervene will not unduly delay or prejudice the adjudication of the rights of the original parties.

2. A preliminary injunction pursuant to rule 65 of the Federal Rules of Civil Procedure restraining defendants Abe Lavine and Louis P. Kurtis, their successors, agents and employees and all persons in active concert and participation with them, from reducing the proposed plaintiff-

intervenors public assistance grant based on the enforcement of 18 N.Y.C.R.R. 352.31(3)(iv) and 352.30(c) and (d) pending the final determination of this action.

The grounds of this motion, as are more fully set forth in the proposed intervenors' verified complaint, in the proposed intervenor's affidavit annexed hereto, are that:

The enforcement of 18 N.Y.C.R.R. 352.31(3)(iv) and 352.30(c) and (d) so as to reduce intervenors' public assistance will cause intervenors grave and irreparable injury, and that intervenors have established probable success of their claim that these regulations are invalid and unconstitutional.

Please take further notice, that opposing affidavits and answering memoranda must be served upon counsel for plaintiffs at least three days before the return day of this motion.

Dated: March 19, 1973
Buffalo, New York

Respectfully submitted,

Margaret Dodd
The Legal Aid Bureau of Buffalo, Inc.
Neighborhood Legal Services
Michael A. O'Connor, of Counsel
Margaret Dodd, of Counsel

Affidavit of Loretta Clark in Support of Motion.

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF ERIE
CITY OF BUFFALO } ss.:

LORETTA CLARK, being duly sworn deposes and says:

1. That I am one of the proposed intervenors in the above captioned action. I make this affidavit in support of my motions to intervene for preliminary injunction on behalf of myself and my minor children.

2. My five minor chilidren and I are citizens of the United States and residents of Buffalo, New York, and reside together at 249 Moselle, Buffalo, New York. I was divorced in September, 1967 and have not seen, heard or been in contact with my husband for several years and do not know where he presently can be located.

3. I am thirty-nine (39) years of age and reside with my five minor children, Loretta Jean Clark age 12, Betty Anne Clark age 11, Lillian Marie Clark age 9 and Clara and Dawn Clark, twins age 6, and my male friend, Sidney Ray who is forty-four (44) years of age.

4. My five minor children and I are receiving public assistance pursuant to the federal-state AFDC program and have been receiving such assistance for approximately the last twelve years.

5. I currently receive outpatient treatment for nervous tension twice weekly at the Meyer Memorial Hospital in Buffalo, in February, 1973 I was a full time patient at the

Meyer Hospital with a severe case of pneumonia and I have not yet fully recovered.

6. My oldest daughter, Loretta Jean was born with a congenital heart defect known to me as "blue baby" and she continues to receive outpatient care several times per month at Children's Hospital in Buffalo.

7. My male friend and I have lived together for about four years. During that period he has helped with housework, and preparing meals, and he has looked after the children when I have been ill or when I have to take one of my children on an errand. Mr. Ray and I intend to live together in the future, but we do not at this time, intend to marry.

8. Mr. Ray has supported himself by working at various jobs, generally as a janitor or general maintenance man. When Mr. Ray is working he generally pays for his own share of the household food budget. Mr. Ray also makes occasional gifts of clothing to my children; however, he does not appear willing or able to undertake actual support of me or any of my children.

9. Prior to November 1, 1972 my semi-monthly public assistance grant was $204.00; but thereafter the grant was reduced further because I received a notice dated December 6, 1972 from the Erie County Department of Social Services that my grant would be reduced to $174.60. See exhibit "A". That reduction was delayed pending an administrative appeal.

10. A fair hearing was held on January 8, 1973 and at that time the agency revised the amount of reduction to $187.90 because Mr. Ray was unemployed and had no income whatever. In a fair hearing decision dated February

Affidavit of Loretta Clark.

14, 1973 the Commissioner of the Department of Social Services affirmed the determination that my grant should be reduced to $187.90. See exhibit "C". Since our circumstances remain unchanged, I expect the reduction of assistance to be implemented shortly.

11. The health and welfare of my children and myself would be endangered if my public assistance grant is reduced. For example, the Erie County Department of Social Services has recently authorized me to retain ownership of a 1965 Ford station wagon on grounds that a car is essential to travel to and from medical providers, but no extra money is available to operate the car. Therefore my family's subsistence budget is already severely strained, and a reduction of assistance will simply mean less food for my children.

WHEREFORE, I respectfully pray this Court grant my motion to intervene and for a preliminary injunction.

(Sworn to by Loretta Clark, March 1973.)

Notice of Intent to Reduce Public Assistance, Exhibit "A" to Clark Affidavit.

ERIE COUNTY

DEPARTMENT OF SOCIAL SERVICES

Edward A. Rath County Office Building
95 Franklin Street
Buffalo, New York 14202

NOTICE OF INTENT TO REDUCE PUBLIC ASSISTANCE

Name of Recipient: Loretta Clark

Address: 249 Moselle St.
Buffalo, N.Y. 14211

Cat./Case No.: ADCU 274293

Date: 12/6/72

This is to advise you that this department intends to reduce your public assistance grant from $199.60 semi-monthly to $174.60 semi-monthly eff. 1/1/73 for the following reason(s):

Since Sidney Ray works part-time for the Council of Churches, but doesn't know ahead of time exactly when or how long he will be working, we will begin budgeting $50. per month income. If in any given month he does not earn that much, we will be able to send you a supplement, but only upon receipt of written verification of his actual hours worked and wages earned.

You may have a conference at this department to review your case at any time before the proposed date of reduction of your grant. To make an appointment, telephone 846-7541.

Notice of Intent to Reduce Public Assistance, Exhibit A to Clark Affidavit.

Dan Ross Supervisor	12/6/72 Date

W. Chavous—IN 3

Right To Fair Hearing

If you believe that your assistance should not be reduced, you may request a state fair hearing by telephoning 842-4377 or by writing to Fair Hearing Section, New York State Department of Social Services, 1450 Western Avenue, Albany, New York 12203. If you request a fair hearing, a notice will be sent to you informing you of the time and place of your hearing. At the hearing, you, your attorney or other representative will have an opportunity to present relevant written and oral evidence to demonstrate why your assistance should not be reduced as well as an opportunity to question any persons who appear at the hearing and present evidence against you. If you request a fair hearing before the date your assistance is proposed to be reduced, you will continue to receive your assistance unchanged until the fair hearing decision is issued.

Decision After Fair Hearing, Exhibit "C" to Clark Affidavit.

State of New York

DEPARTMENT OF SOCIAL SERVICES

In the Matter of the Appeal of

Loretta Clark

from a determination by the Erie County Department of Social Services (hereinafter called the agency)

A fair hearing was held at 95 Franklin Street, Buffalo, New York, on January 8, 1973, before Alfred F. Cohen, Hearing Officer, at which the appellant, the appellant's representative and representatives of the agency appeared. The appeal is from a determination by the agency relating to the reduction of a grant of aid to dependent children. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

(1) Appellant, age 38, has a household consisting of herself, five minor children, and a man who is unrelated.

(2) Appellant and her five minor children are currently recipients of aid to dependent children.

(3) On December 6, 1972, the agency determined to reduce appellant's recurring semi-monthly cash grant of assistance because an unrelated person was residing in the household.

(4) The man residing in appellant's household was unemployed and had not applied for nor was he receiving public assistance.

(5) The agency recomputed appellant's semi-monthly budget effective January 1, 1973 as follows:

Basic allowance (6 persons)	$296.00
Rent (6/7 of $75.00)	64.29
Heat (6/7 of $18.20)	15.60
Total monthly needs	$375.89
Semi-monthly cash grant	$187.90

(6) The agency sent a Notice of Intent to reduce appellant's grant on December 6, 1972, to be effective January 1, 1973. The appellant requested a fair hearing to review the agency's proposed action on December 21, 1972. The agency was notified by the State Department of Social Services that appellant's grant must be continued without change until a fair hearing decision is issued. The agency has continued assistance unchanged to the appellant through the date of this hearing and the agency has stated that assistance will be continued until a fair hearing decision is issued.

The record clearly establishes that an unrelated person has been residing in appellant's household and has not applied for nor is he in receipt of public assistance.

Paragraph (d) of Section 352.30 of the Regulations of the State Department of Social Services provides as follows:

"A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the

lodger, the amount in excess of $15.00 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does not contribute at least $15.00 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance."

As there was no evidence presented to establish that the unrelated person in appellant's household was contributing at least $15.00 per month, the agency correctly determined to prorate the family's shelter allowance including fuel for heating as provided in accordance with the aforecited section of the regulations.

Accordingly the agency properly determined to reduce appellant's recurring semi-monthly cash grant of assistance.

DECISION: The determination of the agency is affirmed.

DATED: Albany, New York, Feb 14 1973

ABE LEVINE
Abe Levine
COMMISSIONER

By CARMEN SHANG
Carmen Shang
ASSISTANT COMMISSIONER

Notice of Motion to Dismiss Amended Complaint or for Summary Judgment on Behalf of State Defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the (amended) complaint verified on August 28, 1972, and filed herein, and upon all the papers, heretofore had herein, the illegible ???? will move this Court, before Judge Arnold Bauman, at Room 705, United States Courthouse, Foley Square, New York, New York on the 9th day of March, 1973 at 9 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure dismissing the action on the respective grounds that the Court lacks jurisdiction over the subject matter and that the (amended) complaint fails to state a claim upon which relief can be granted.

PLEASE TAKE FURTHER NOTICE that the defendants demand in the alternative, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, that the Court grant a summary judgment in defendants' favor on the statutory and pendent claim alleged.

Dated: New York, New York, February 21, 1973.

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants

To: JERALD S. SLATE, Esq.
MARTIN A. SCHWARTZ, Esq.
Legal Aid Society of
Westchester County

Defendants' Statement Pursuant to General Rule 9-G of the Rules of the Southern District of New York and in Opposition to Plaintiffs' 9-G Statement.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendants, as and for their statement pursuant to General Rule 9-G of the Rules of the Southern District of New York and in opposition to plaintiffs' 9-G statement, respectfully alleges:

1. Paragraph "1" to and inclusive of paragraph "8" are accepted as presenting material facts as to which there are no genuine issues to be tried.

2. Paragraph "9" is rejected and denied as not presenting material facts.

3. Defendants submit on their own behalf a new paragraph to provide as follows:

> "In the 'Decision After a Fair Hearing' the Acting State Commissioner Barry Van Lare further found that; 'the agency should have deducted $30 a month from the cost of shelter as has [the lodger's] pro rata share of rent. The determination of the agency is reversed. The agency is directed to recompute the appellant's grant for the months involved in accordance with the foregoing and to issue a grant in the

amount of the difference between what the appellant should have received, and that which she did receive' ''.

Dated: New York, New York, March 5, 1973.

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants

GENE B. MECHANIC
Law Apprentice

Answer of County Defendant.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant, LOUIS P. KURTIS, answering the Complaint herein by his Attorney, John J.S. Mead, respectfully alleges:

FIRST: Denies each and every allegation contained in Paragraph 14 of the Complaint except admits Plaintiff's friend was not under any legal obligation to provide financial support or assistance to the Plaintiff or her three children.

SECOND: Denies each and every allegation contained in Paragraph 20 of the Complaint except admits that Plaintiff's public assistance was reduced by $30 each month for a period of four months.

THIRD: Denies each and every allegation contained in Paragraph 21 of the Complaint except admits to the existence of the regulations cited therein.

FOURTH: Denies each and every allegation contained in Paragraph 24 of the Complaint.

FIFTH: Denies each and every allegation contained in Paragraphs 25, 26, 27 and 28 of the Complaint.

AS AND FOR AN AFFIRMATIVE DEFENSE TO THE COMPLAINT HEREIN, DEFENDANT LOUIS P. KURTIS ALLEGES

SIXTH: That the purpose of the regulations sought to be held unconstitutional is to assure the use of the monthly grant for the purposes for which granted, i.e., for food, clothing and shelter for the children and the Plaintiff.

SEVENTH: That the Plaintiff's insistance upon having a male friend residing with her and her children over a sustained period without contribution to the household results, in effect, in a dimunition of the childrens' grant for food, clothing and incidentals.

EIGHTH: That Plaintiff's allegation that the male friend does not contribute to the household needs is, in effect, an admission of her misuse of the children's grants for the purposes of supporting her male friend.

NINTH: Neither Defendant, Louis P. Kurtis, nor the regulations forbid Plaintiff to free association with her

male adult friend or any friends so long as such association does not result through residence of such friends in the lessening of the children's grant for food, clothing and incidentals.

TENTH: That the Plaintiff has the burden, because of the facts in each separate case, to establish that the male friend's continued presence in the home does not, in fact, result in a diminution of the children's grants for food, clothing and incidentals.

ELEVENTH: That the Defendant Louis P. Kurtis, has a statutory obligation to determine that a grant under the ADC Program is being used for the purposes for which it is intended under the Federal and State regulations.

WHEREFORE, Defendant, Louis P. Kurtis respectfully requests the Complaint be in all respects denied and such other and further relief as to the court may seem proper.

JOHN J.S. MEAD
County Attorney for the
County of Westchester
Attorney for Defendant

Regulatory History of 18 NYCRR §§ 352.30(d) and 352.31(a)(3)(iv) Submitted in Response to Notice to Produce Directed to State Defendants.

352.30 PERSONS INCLUDED IN THE BUDGET.

• • •

(c) A non-legally responsible relative in the household who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15.00 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income.

[Effective June 2, 1970]

• • •

Subdivision (c) of section 352.30 is hereby amended to read as follows:

(c) A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15.00 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance.

Paragraph (3) of subdivision (a) of section 352.31 is hereby REPEALED and a new paragraph (3) is substituted in lieu thereof to read as follows:

(3) When a female applicant or recipient is living with a man to whom she is not married, other than on an occasional or transient basis, his available income and resources shall be applied in accordance with the following:

(i) When the man is willing to be considered as a spouse, his available income and resources shall be applied in determining eligibility and degree of need.

(ii) When the man is willing to assume responsibility only for his needs, the needs of the woman and those children for whom he is the acknowledged or adjudicated father, his available income or resources shall be applied in determining eligibility and degree of need of such persons only; and assistance for any remaining children shall be provided on a pro rata basis.

(iii) When the man is willing to assume responsibility only for his needs, and the needs of those children for whom he is the acknowledged or adjudicated father, his available income and resources shall be applied in determining eligibility and degree of need of such persons only; and assistance for the woman and remaining children shall be provided on a pro rata basis.

(iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(c).

(v) The foregoing shall not affect the responsibility of a man to provide support for children of which he is the acknowledged or adjudicated father, nor shall it relieve the social services official for his responsibility to initiate apropriate support proceedings.

[Effective August 31, 1970]

• • •

Subdivision (c) of section 352.30 is relettered to be subdivision (d) and a new subdivision (c) is added thereto to read as follows:

(c) When an applicant or recipient willfully fails or refuses to comply with the requirements of Part 385 of Department Regulations, his needs shall be excluded from consideration in determining the family members' needs. The appropriate recurring allowances shall be provided for the remaining family members in accordance with family size, as reduced, and circumstances.

Paragraph (2) of subdivision (a) of section 352.31 is hereby amended to read as follows:

(2) All available and unrestricted income of an applicant or recipient and of the spouse, if in the home, including support payments required to be made by a parent pursuant to an order of the family court or other appropriate court, shall be prorated and applied against the needs of the applicant, the spouse and the minor children of either or both. The income of a legally responsible relative in the home who has been disqualified under Part 385 of Department Regulations shall be treated in like manner.

(i) Under exceptional circumstances other than disqualification under Department Regulations Part 385, a spouse who refuses to make application for assistance and to have his income so applied against the needs of his family, shall have his needs estimated as if he were applying for public assistance and his income applied first against his own needs and any surplus against the needs of his dependents.

[Effective August 26, 1971]

Opinion of District Judge Arnold Bauman.

[SAME TITLE]

BAUMAN, D. J.

Before the court is yet another action challenging the manner in which the State of New York allocates its welfare funds. Plaintiff and her three minor children receive public assistance pursuant to the Aid to Families with Dependent Children (AFDC) program. The action is brought on their behalf, and on behalf of all others similarly situated, to enjoin the enforcement of 18 N.Y.C.R.R. § 352.31 (a)(3)(iv)[1] and 18 N.Y.C.R.R. § 352.30(c) and (d)[2] and to secure retroactive public assistance payments of which she claims to have been unlawfully deprived.

The plaintiff has moved for class determination pursuant to Rule 23 of the Federal Rules. She also seeks summary judgment pursuant to Rule 56, and thereby, a permanent injunction against the enforcement of the attacked state regulations as well as retroactive welfare payments. Plaintiff argues that these regulations are violative of the due process and equal protection clauses of the Fourteenth Amendment and repugnant to the rights of privacy and freedom of association secured by the First, Ninth, and Fourteenth Amendments. She also contends that they are violative of the Supremacy Clause (Article VI) in that they conflict with the provisions of subchapter IV of the Social Security Act, 42 U.S.C. § 601 et seq. and the regulations promulgated thereunder. The defendants in turn have moved to dismiss the action pursuant to Rules 12(b)1 and 12(b)6 of the Federal Rules on the grounds that this court lacks subject matter jurisdiction and that the complaint fails to state a claim upon which relief can be granted. In addition, Phyllis D'Alessio and Loretta Clark, both mothers

receiving aid under the AFDC program, seek to intervene pursuant to Rule 24(b)(2). The defendants oppose their intervention.

I.

A brief exposition of Mrs. Hurley's situation may help illuminate the difficulty in which she and others in her purported class find themselves.[3]

Mrs. Hurley has been living apart from her husband since 1967 and claims not to have seen or heard from him since that time. From November, 1970 through February, 1971 a male who contributed nothing toward her maintenance or that of her three children lived with her. Her rent during that period was $150 per month. Upon learning of the presence of a male lodger, the Westchester County Department of Social Services, without explanation as to how the figure was reached, deducted $35 per month for the four months from plaintiff's recurring grant.

On November 12, 1970 plaintiff requested a State Fair Hearing which was held on March 22, 1971 in White Plains, New York. In a decision rendered September 20, 1971, Barry Van Lare, the Acting Commissioner of the Department of Social Services, upheld the grant reduction but ruled that the Westchester Department should have deducted $30 rather than $35 from her stipend.[4]

Plaintiff claims that she still wishes to associate and reside with this male friend, but is afraid to do so because of the anticipated reduction in her public assistance grant.

II.

I shall first consider plaintiff's motion that this be designated a class action pursuant to Rule 23(a)[5] and Rule 23(b)2[6] of the Federal Rules. The proposed class would consist of "all residents of the State of New York who are or were receiving public assistance, who have had their

grants reduced, terminated, suspended or denied, or who are threatened with reduction, termination, suspension or denial, solely because of the enforcement of 18 N.Y.C.R.R. § 352.31(a)(3)(iv) and § 352.30(c) and (d)."

It would appear that all of the requirements in the above cited rules have been met and that this may proceed as a class action. Plaintiff's efforts to demonstrate satisfaction of the numerosity requirement, Rule 23(a)1, have been thwarted in part by the state's failure to compile any statewide statistics on the number of recipients whose grants have been reduced because of the presence of lodgers.[7] However, the defendants did furnish statistics compiled by a research analyst in the State Department of Social Services indicating that as of November 1, 1972, there were 477 such cases in New York City. That figure alone would render the class so numerous that joinder would be impracticable, and it may reasonably be assumed that the total number in the state is far larger still.

Plaintiff's claims are typical and there can be no dispute that the questions of law or fact are common to the class. It has been frequently noted in similar cases that the state's promulgation of an unconstitutional regulation and/or its failure to comply with regulations of the Department of Health, Education, & Welfare affects all welfare recipients in the same manner. *Seritella* v. *Engelman,* 339 F.Supp. 738 (D.N.J. 1972); *Almenares* v. *Wyman,* 334 F.Supp. 512 (S.D.N.Y. 1971), affd., 453 F.2d 1075 (2nd Cir. 1971). For the purpose of determining the constitutionality of the challenge regulations, it does not matter that plaintiff and some members of the class have received Fair Hearings and others have not. The exhaustion of state administrative remedies is not a prerequisite to the maintenance of an action under 42 U.S.C. § 1983. *Sostre* v. *McGinnis,* 442 F.2d 178 (2nd Cir. 1971); *Carter* v. *Stanton,* 405 U.S. 669 (1972); *Damico* v. *California,* 389 U.S. 416 (1967). Accordingly, even where some of the named plaintiffs have

exhausted their administrative remedies, the class may nevertheless include others who have not. *Doe* v. *Lavine,* 347 F.Supp. 357 (S.D.N.Y. 1972); *Broussard* v. *Schlumberger Well Services,* 315 F. Supp. 506 (S.D.Tex. 1970); *Miller* v. *International Paper Co.,* 408 F.2d 283 (5th Cir. 1969). Hence such factual distinctions among members of the class have little bearing on the resolution of the central question presented by this action, namely, the constitutionality of the New York regulations.

I have no doubt that the representative party will fairly and adequately protect the interests of the class. The Legal Aid Society of Westchester County, which represents both Mrs. Hurley and Mrs. D'Alesio, one of the intervenors, has demonstrated a high standard of advocacy in both its written and oral presentations before this court, and I am certain that it will continue to do so.

Finally, it is also clear that the instant action is precisely of the type contemplated by Rule 23(b)2. The Advisory Committee Notes to Rule 23 with reference to this subsection point up its applicability:

> "This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class and final relief of an injunctive nature, setting the legality of the behavior with respect to the class as a whole, is appropriate . . . Action or inaction is directed to a class within the meaning of this subsection even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.
>
> Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." (Citations omitted).

Examples of cases challenging state welfare laws in which class action status has been granted are legion. *Almenares* v. *Wyman, supra; Gaddis* v. *Wyman,* 304 F.Supp. 717 (S.D.N.Y. 1969); *James* v. *Goldberg,* 302 F.Supp. 478 (S.D.N.Y. 1969); *Doe* v. *Shapiro,* 302 F.Supp. 761 (D. Conn. 1969). The motion to designate the instant case a class action is therefore granted.

III.

I am also satisfied that this court has jurisdiction to entertain this action pursuant to 42 U.S.C. § 1983 and its jurisdictional complement, 28 U.S.C. § 1343(3). It is now well settled that jurisdiction exists under § 1343(3) only if the complaint presents a substantial constitutional question. *Almenares* v. *Wyman,* 453 F.2d 1075, 1082 (2nd Cir. 1971); *Merriweather* v. *Burson,* 439 F.2d 1092 (5th Cir. 1971). I therefore intend to review the plaintiff's constitutional arguments. The survey shall be brief because, as shall appear more fully below, it appears that the question presented by this case can be resolved on statutory grounds alone. I therefore need consider the substantiality, but not the substance of the constitutional claims.

Plaintiff makes four separate constitutional arguments. First, she urges that the regulations, by discouraging the presence of a male lodger, exert a chilling effect on her right to free association secured by the First and Fourteenth Amendments. See generally, *N.A.A.C.P.* v. *Alabama ex rel. Patterson,* 357 U.S. 449 (1958); *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960); *Gibson* v. *Florida Legislative Investigation Committee,* 372 U.S. 539 (1963). Second, she argues that they violate her right of privacy and right to freedom from governmental intrusion into the home. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Stanley* v. *Georgia,* 394 U.S. 557 (1969); *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972). Third, plaintiff contends that the assumption implicit in the challenged regulations that a lodger will contribute his *pro rata* share of shelter costs constitutes a conclusive presumption in violation of the Due Process clause of the Fourteenth Amendment. *Carrington* v. *Rash,* 380 U.S. 89 (1965); *Stanley* v. *Illinois,* 405 U.S. 645 (1972); *Vlandis* v. *Kline,* —— U.S. —— (June 11, 1973); *United States Department of Agriculture* v. *Murry,* —— U.S. —— (June 25, 1973). Her final argument is that the regulations violate the equal protection clause of the Fourteenth Amendment by discriminating arbitrarily between two classes of equally needy families: those without a lodger, who receive a full welfare stipend, and those with whom a lodger resides, and whose stipend is accordingly reduced. See *Dandridge* v. *Williams,* 397 U.S. 471 (1970); *Jefferson* v. *Hackney,* 406 U.S. 435 (1972).

Without implying any judgment on the merits of the other three contentions,[8] I find that at least plaintiff's due process argument raises a substantial constitutional question. The Supreme Court has long held that "a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." *Heiner* v. *Donnan,* 285 U.S. 312 (1932). To cite one recent example, the Court in *Stanley* v. *Illinois,* supra, found unconstitutional an Illinois law which made illegitimate children the wards of the state upon the death of their mothers and which consequently presumed unmarried fathers to be unfit to raise such children. It concluded that, as a matter of due process, an unmarried father was entitled to a hearing on his fitness as a parent before being deprived of his children. The Court observed that Illinois "insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing . . ." 405 U.S. at 658.

In several recent cases courts have concluded that statutes similar to those at issue here created conclusive presumptions incapable of being contravened by a factual showing. In *Boucher* v. *Minter,* 349 F.Supp. 1240 (D.Mass. 1972), a three judge court struck down a provision of the Massachusetts AFDC program which reduced the shelter allowance to needy children upon the remarriage of their mother. The court held, inter alia, "[t]he irrebuttable presumption underlying the defendants' policy, namely, that after the mother's remarriage the children in the AFDC family do not need a shelter allowance and that household expenses will be paid by the stepfather is unrealistic and arbitrary." See also *Jenkins* v. *Georges,* 312 F.Supp. 289 (W.D.Pa. 1969); *Owens* v. *Parham,* 350 F.Supp. 598 (N.D. Ga. 1972); *Rosen* v. *Hursh,* 464 F.2d 731 (8th Cir. 1972).

Because 18 N.Y.C.R.R. § 352.31(a)(3)(iv) and §§ 352.30 (c) and (d) automatically prorate a family's shelter allowance upon the presence of a male, I conclude that plaintiff's contention that a conclusive presumption is thereby created in violation of the Due Process Clause presents a substantial constitutional question and is a sufficient predicate for jurisdiction under 28 U.S.C. § 1343(3). I wish to emphasize that I do not pass on the substance of this question, both because the issue can be resolved on narrower ground and because it would be improper for a single judge to do so. I find only that the plaintiff has adequately refuted defendants' contention that the constitutional arguments presented here are frivolous or a mere pretext for placing the statutory arguments before this court.

III.

Before turning to plaintiff's contention that the challenged New York regulations are inconsistent with regulations promulgated under the Social Security Act, two observations are in order. First, it is now established that

a suit to enjoin the enforcement of a state statute on the ground of its asserted repugnancy to a federal statute does not require the convening of a three judge court. *Swift and Company* v. *Wickham,* 382 U.S. 112 (1965); *Ex parte Buder,* 271 U.S. 461 (1926); *Ex parte Bransford,* 310 U.S. 354 (1940); *Case* v. *Bowles,* 327 U.S. 92 (1946). Second, where a court is presented with both constitutional and statutory claims, it is obliged to consider first the statutory claims. *Rosado* v. *Wyman,* 397 U.S. 397 (1970). I find myself in agreement with Judge Gurfein that "the most appropriate course for the district judge is to first face the statutory claim alone, since on it a three judge court is not required and since a three-judge court, if convened, would have to face it first." *Doe* v. *Lavine,* 347 F.Supp. 357 at 359-360 (S.D.N.Y. 1972). See also *Doe* v. *Gillman,* 347 F.Supp. 483 (N.D. Iowa 1972); *Sadler* v. *Winstead,* 327 F.Supp. 568 (N.D. Miss. 1971); *Connecticut Union of Welfare Employees* v. *White,* 55 F.R.D. 481 (D. Conn. 1972).

The AFDC program, 42 U.S.C. § 601 et seq., is one of three major categorical public assistance programs established by the Social Security Act of 1935. Its purpose is the encouragement of "the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services" to such children. 42 U.S.C. § 601. The dependent child is defined, at 42 U.S.C. § 606(a), as one "who has been deprived of parental support or care by reason of the death, continued absence from the home or physical or mental incapacity of a parent."

§ 606(a) was first carefully scrutinized by the Supreme Court in *King* v. *Smith,* 392 U.S. 309 (1968). At issue there was an Alabama regulation denying AFDC assistance to the children of any mother (1) who lived with a man; (2) who was visited frequently by a man "for the purpose of cohabiting"; or (3) who cohabited with a man even outside

her children's home. Under the Alabama scheme it was irrelevant whether the man was legally obligated to support the children, and equally irrelevant whether he did in fact make any contribution toward their support. The State of Alabama argued before the Court that its regulation simply further refined the definition of "absent parent" under § 606(a); it further contended that its regulation significantly reduced the welfare caseload, discouraged sexual intercourse, and put "informal" families on the same footing as other families. The Court rejected all of these contentions. It found it "inconceivable . . . that Alabama is free to discourage immorality and illegitimacy by the device of absolute disqualification of needy children." It further concluded that "Congress intended the term 'parent' in . . . 42 U.S.C. § 606(a) to include only those persons with a legal duty of support." The Court there struck down Alabama's regulation because it defined "parent" in a manner inconsistent with the federal statute.

The Court's exegesis of § 606(a) in *King* v. *Smith* was codified in 45 C.F.R. § 203.1.[10] That provision defined "parent" in accordance with the Court's interpretation and further provided that in determining a child's financial eligibility, a State could consider "only such income as is actually available for current use on a regular basis." In *Lewis* v. *Martin,* 397 U.S. 552 (1970), the Court had occasion to consider these new regulations, and that decision has a readily apparent relevance for the instant case. That case presented a challenge to a California law providing that welfare payments to children who lived with their mother and stepfather "or an adult male person assuming the role of spouse" (MARS) shall be computed after consideration is given to the income of the stepfather or MARS. The Court noted (without explicitly adverting to the Due Process Clause of the Fourteenth Amendment) that this statute conclusively presumed that a child's needs were

reduced by the income available from the man in the house whether or not such income was used to meet these needs. It upheld 45 C.F.R. § 203.1 as a reasonable exercise of HEW's administrative judgment and held that "[i]n the absence of proof of actual contribution, California may not consider the child's 'resources' to include either the income of a non-adopting stepfather who is not legally obligated to support the child as is a natural parent, or the income of a MARS—whatever the nature of his obligation to support." 397 U.S. at 559-560. The *Lewis* case has frequently been invoked by lower federal courts to invalidate state statutes which reduce AFDC grants to reflect the support supposedly provided by a stepfather or "man in the house." *Rosen* v. *Hursh,* 464 F.2d 731 (8th Cir. 1972); *Gilliard* v. *Craig,* 331 F.Supp. 587 (W.D.N.C. 1971), affd, 409 U.S. 807 (1972); *Gaither* v. *Sterret,* 346 F.Supp. 1095 (N.D.Ind. 1972), affd., 409 U.S. 1070 (1972). See also, *Reyna* v. *Vowell,* 470 F.2d 494 (5th Cir. 1972); *Solman* v. *Shapiro,* 300 F.Supp. 409 (D.Conn. 1969), affd. 396 U.S. 5 (1969).

In the case at bar plaintiff argues that 18 N.Y.C.R.R. § 351(a)(3)(iv) and § 352.30(c) and (d) are inconsistent with 45 C.F.R. § 233.90. She claims that these statutes, by effecting a *pro rata* reduction in the rental stipend because of the presence of a lodger, conclusively presume that the lodger is contributing to the family's income, whether or not he can or does make such a contribution. Indeed, the hearing examiner's decision specifically included the following finding: "The record establishes that the man residing with appellant [Mrs. Hurley] was not willing to assume responsibility for the appellant or her children of which he is not the acknowledged or adjudicated father. In addition, no contribution is made by the lodger to the appellant." Plaintiff argues that the state statutes which effect a reduction in the rental stipend in disregard of such circumstances violate the policies enunciated in the *King* and *Lewis* decisions and embodied in 45 C.F.R. § 233.90.

Defendants, unable to distinguish those cases convincingly, offer but one argument in rebuttal. They contend that the only purpose of the challenged statutes is to prevent the allocation of AFDC funds to non-eligible persons. The regulations "merely pro rate the rent among the eligible persons and compute the shelter allowance accordingly, leaving the lodger and non eligible to pay his own way."[11] It would be unfair, the defendants imply, to permit a male lodger, who need not have qualified for public assistance, to share in the family's rental stipend. In order to prevent state subsidy of an ineligible recipient, the argument continues, the stipend must simply be reduced by the lodger's proportionate share.

I find the defendants' argument utterly unpersuasive and hold that the challenged regulations are inconsistent with 45 C.F.R. § 233.90. Despite the defendants' professed concern that ineligibles not receive a rental stipend, the inevitable result of these regulations is to reduce, perhaps drastically, the stipend for those who are eligible. In the case of a mother with one child for example, the presence of a non-contributing male lodger would reduce the rental stipend by 33⅓%. This devastating reduction means in practice that rental payments must be met out of that portion of the welfare stipend allotted for food and clothing.

The regulations thus conflict directly with § 233.90, a portion of which states: "[u]nder this requirement, the inclusion in the family, or the presence in the home, of a 'substitute parent', or 'man in the house', or any individual other than that described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the state." Despite the defendants' protestations to the contrary, a *pro rata* reduction does indeed assume that the male lodger will pay his own way, whether or not he actually does. That

is precisely the assumption found impermissible in *King* and *Lewis*.

It should also be noted that the regulations here under scrutiny are in one sense far cruder than were those at issue in *Lewis* v. *Martin, supra*. The California statutes at least took into account the income of the stepfather or MARS in computing the stipend payable to the family. The New York regulations reduce the rental stipend *regardless* of the lodger's income. Hence children who could qualify for a full stipend under the California plan (i.e., if the MARS in fact had no income) would have their rental stipend reduced under the New York scheme. The Supreme Court found the California regulations not calibrated carefully enough to consider income actually available to the child. These New York statutes, I find, are even less sensitive instruments.

This is not the first attempt by a state to reduce a shelter allowance on the theory that the cohabitation of eligibles and non-eligibles makes the state responsible for only a proportionate share of the rent. In *Boucher* v. *Minter*, noted at pages 8-9, supra, the Massachusetts statute operated similarly. The court there perceptively identified the fallacy in the reasoning of the statute:

> "Although she has become a member of her new husband's family, the mother remains the head of a family, distinct for purposes of AFDC, comprised of herself and her children and is no less logical a conduit for shelter payments for the children if they in fact remain in need. That family unit remains unchanged since the stepfather does not join it in law; and if he does not join it in fact, by economic participation in its expenses, there is no basis in law or fact for an irrebuttable presumption that the shelter needs of the children have not continued despite the remarriage."

That flaw inheres in the New York regulations as well. See also, *Jenkins* v. *Georges,* 312 F. Supp. 289 (W.D.Pa. 1969); *Owens* v. *Parham,* 350 F. Supp. 598 (N.D.Ga. 1972).

In conclusion, then, I find that 18 N.Y.C.R.R. § 352.31(a)(3)(iv) and § 352.30(c)(d) are inconsistent with 45 C.F.R. § 233.90 and thus violative of the Supremacy Clause of the Constitution. Accordingly, an appropriate injunction shall issue against their enforcement.

V.

Two matters only remain for resolution. The first is the motion by Phyllis D'Alessio and Loretta Clark to intervene pursuant to Rule 24(b)2 of the Federal Rules.[12] Little would be gained by setting forth the proposed intervenors' backgrounds, for they are in all relevant details similar to that of Mrs. Hurley. Both are mothers receiving AFDC payments who have lost contact with the fathers of their children, and both have lived or are now living with men with whom they wish to reside on a permanent basis. Mrs. Clark has already received a Fair Hearing and suffered a *pro rata* reduction in her stipend. Mrs. D'Alessio has merely been threatened with a reduction.

A motion under Rule 24(b)(2) is addressed to the discretion of the district court, *Lipsett* v. *United States,* 37 F.R.D. 549 (S.D.N.Y. 1965), appeal dismissed, 359 F.2d 956 (2nd Cir. 1966), and we are continually reminded that the rule should be liberally construed. *Peterson* v. *United States,* 41 F.R.D. 131 (D.Minn. 1966). However, I believe that the rule should be construed in accordance with its underlying purpose, which is the prevention of a multiplicity of lawsuits involving common questions of law or fact. *Reich* v. *Webb,* 336 F.2d 153 (9th Cir. 1964), cert. denied, 380 U.S. 915 (1965). That purpose is already satisfied where, as here, the proposed intervenors fall within a class action designation. Consequently, the liberality with which the

rule is customarily construed must give way to considerations of judicial economy and the avoidance of the confusion caused by multiple claimants. I have therefore concluded that where a suit has been designated a class action, admitting intervenors *who raise no new issues* and who fall within the class merely clutters the action unnecessarily.[13] See *Allen Calculators, Inc.* v. *National Cash Register Co.,* 322 U.S. 137 (1944). I understand Rule 23(d) at least to suggest that to intervene in a class action, applicants must show more than mere identity of questions of fact and law. Were that provision construed otherwise, it would mean that any member of the class, *ipso facto,* has a right to intervene and litigate the action fully. Such a construction would render class actions just as unmanageable as some are wont to fear them.[14]

I have concluded that the proposed intervenors here have not made a showing sufficient to justify their intervention; they have done nothing more than demonstrate factual and legal claims in common with the class. There is no danger that the case will become moot as to the named plaintiff, a circumstance which has been found to justify intervention. *Gaddis* v. *Wyman,* 304 F.Supp. 713 (S.D.N.Y. 1969). Nor is there any contention that the proposed intervenors' interests will be prejudiced or impaired by inadequate representation on the part of the named plaintiff. *Rolle* v. *New York City Housing Authority,* 294 F.Supp. 574 (S.D.N.Y. 1969); *Gabriel* v. *Standard Fruit & S.S. Co.,* 448 F.2d 724 (5th Cir. 1971). There was but one factor weighing in favor of their intervention. Both Mrs. Clark and Mrs. D'Alessio, because they were confronted with the imminent loss of welfare benefits, sought preliminary injunctions. Mrs. Hurley, who had formerly suffered a reduction but was now receiving her full stipend, did not. At oral argument, however, the representative of the Attorney General's office agreed that the stipends of the

proposed intervenors would not be reduced during the pendency of this motion. Their motions for preliminary injunctions were accordingly deemed withdrawn. Had the Attorney General not thus graciously acceded to this court's request, the intervention of the two additional parties would have served a legitimate need in protecting the interests of that portion of the class facing an immediate loss of benefits. In the present posture of the case, the presence of the intervenors serves no discernible purpose, and their application to intervene is accordingly denied.

VI.

In addition to injunctive relief, plaintiff has also sought an order allowing her retroactive welfare payments for the months in which her stipend was improperly reduced. The question of retroactive welfare benefits is, at the moment, an unusually delicate one for the district judges of this Circuit. In *Rothstein* v. *Wyman,* 467 F.2d 226 (2nd Cir. 1972), cert. denied, 411 U.S. 921 (1973), our Court of Appeals, following *Ford Motor Co.* v. *Department of the Treasury of Indiana,* 323 U.S. 459 (1945), held that the Eleventh Amendment foreclosed a court from directing the retroactive payment of public assistance benefits. This view has its adherents. See *Westberry* v. *Fisher,* 309 F. Supp. 12 (D.Me. 1970); *Francis* v. *Davidson,* 340 F.Supp. 351 (D.Md. 1972); *Boucher* v. *Minter,* supra, at fn. 6.

On the other hand, four different three judge courts have granted the payment of retroactive benefits, and each of those decisions was affirmed summarily by the Supreme Court. *Gaddis* v. *Wyman,* 304 F. Supp. 717 (S.D.N.Y. 1969), affd. sub nom. *Wyman* v. *Bowens,* 397 U.S. 49 (1970); *Shapiro* v. *Thompson,* 270 F. Supp. 331 (D.Conn. 1967), affd., 394 U.S. 618 (1969); *Zarate* v. *State Dept. of Health and Rehabilitative Services,* 347 F. Supp. 1004

(S.D. Fla. 1971), affd., 407 U.S. 918 (1972); *Sterrett* v. *Mothers and Childrens Rights Organization* —— F. Supp. —— (N.D. Ind. 1972), affd., 409 U.S. 809 (1972). The *Gaddis* and *Shapiro* decisions antedated the Second Circuit's decision in *Rothstein* but the court did not regard them as binding precedents on the Eleventh Amendment question. Rather, Judge McGowan, speaking for the court, stated that the Supreme Court had not "as yet addressed itself specifically and authoritatively to this issue." Given this view of the value of the summary affirmance, it is unlikely that the decision of the Court of Appeals would have been in any way altered by the affirmances in *Zarate* and *Sterrett.*

It is generally thought that a summary affirmance is a decision on the merits having precedential value. See *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *United States,* 400 U.S. 932 (1970) (White, J., dissenting); *Barton* v. *Sentner,* 353 U.S. 963 (1957) (Burton and Clark, J.J., dissenting); *United States ex rel. Fein* v. *Deegan,* 410 F.2d 13 (2nd Cir.), cert. denied, 395 U.S. 935 (1969); *Doe* v. *Hodgson,* 344 F. Supp. 964 (S.D.N.Y. 1972), affd., 478 F. 2d 537 (2nd Cir. 1973); Stern and Gressman, *Supreme Court Practice* 197 (4th ed. 1969). Nevertheless, the *Rothstein* court was obviously aware that the Eleventh Amendment defense had not been considered at length by the district courts in *Gaddis* and *Shapiro* (nor was it in *Zarate* or *Sterrett*). The court may then have concluded that, even though the question of retroactive benefits had technically been before the Supreme Court in those cases, the new gloss placed on the problem by the Eleventh Amendment defense had not. Of course, if the import of the court's remark that the Supreme Court "has not yet come to grips" with the question be taken literally, it suggests that a summary affirmance has no precedential value whatever. See *Dillenburg* v. *Kramer,* 469 F.2d 1222 (9th Cir. 1972).

The matter now however appears ripe for determination by the Supreme Court. In *Jordan* v. *Weaver,* 472 F.2d 985 (7th Cir. 1973) the Seventh Circuit concluded (a) that the prior Supreme Court affirmances were entitled to full precedential force; (b) that at all events, the Eleventh Amendment is no bar to the payment of retroactive benefits; and (c) that even if the Eleventh Amendment was a bar, Illinois had "constructively consented" to such actions. The Supreme Court has granted certiorari —— U.S. ——, 41 USLW 3644 (June 12, 1973) and obviously will address the problem in the coming term.

Meanwhile, however, as a district judge I consider myself bound both by the Second Circuit's construction of the Eleventh Amendment and by its view of the precedential force of the various summary affirmances. Although suits by welfare recipients are numerous, the question of the Eleventh Amendment as a defense to the payment of retroactive benefits has been treated but rarely. I therefore regard the *Rothstein* decision as authoritative and accordingly deny plaintiff's motion for the payment of such benefits here.

In conclusion, plaintiff's motion that this proceed as a class action is granted. Plaintiff's motion for summary judgment is granted to the extent that an injunction shall issue permanently enjoining the enforcement of 18 N.Y.C.R.R. § 352.31(a)(3)(iv) and § 352.30(c) and (d). Plaintiff's motion is denied to the extent that it seeks an order directing the payment of retroactive welfare payments, and that portion of the complaint is dismissed. Defendants motion to dismiss for failure to state a cause of action is denied, as is its alternative motion for summary judgment. The motions of Clark and D'Alessio to intervene are also denied.

The parties are directed to settle an order on notice providing for an appropriate form of injunctive relief.

Dated: October 3, 1973.

ARNOLD BAUMAN
U.S.D.J.

FOOTNOTES

[1] 18 N.Y.C.R.R. § 352.31(a)(3)(iv):

"§ 352.31 *Estimate of need and application of income*

(a) For applicant or recipient.

• • •

(3) When a female applicant or recipient is living with a man to whom she is not married, other than on an occasional or transient basis, his available income and resources shall be applied in accordance with the following:

• • •

(iv) When the man is unwilling to assume responsibility for the women or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(c)."

The reference to § 352.30(c) is erroneous; it is clear from the text of the section, set out at footnote 2, infra, that the reference should be to § 352.30(d).

[2] 18 N.Y.C.R.R. § 35230 *Persons included in the budget*

"(c) When an applicant or recipient wilfully fails or refuses to comply with the requirements of Part 385 of this Title, the needs of the family shall be determined as if he were a member of the family, however, the grant shall be provided on a pro rata basis for the eligible family members only.

(d) A non-legally responsible relative or unrelated person in the household, who is not applying for non receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does

not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance."

[3] The ensuing account is adopted from plaintiff's statement submitted pursuant to Rule 9-G of the Southern District Rules in support of her motion for summary judgment. With one unimportant exception, none of the facts in that statement is disputed by the defendants.

[4] This computation was reached in accordance with the controverted state regulations, cited at footnotes 1 and 2, which provide that if a male lodger does not contribute at least $15 per month, the family shelter allowance shall be reduced by the lodger's *pro rata* share. The previous shelter allowance had been $150, and thus the male lodger's *pro rata* share was 1/5 x $150 or $30.

[5] Rule 23(a):

"(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

[6] Rule 23(b)(2):

"(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivison (a) are satisfied, and in addition:

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or"

[7] See the letter of Judith A. Gordon, Assistant Attorney General, to Jerold S. Slate of the Legal Aid Society of Westchester County, appended as Exhibit C to the Slate affidavits.

[8] From his concurring opinion in *United State Department of Agriculture* v. *Moreno,* —— U.S. at —— (June 25, 1973), it is apparent that Mr. Justice Douglas would regard the arguments based on privacy and freedom of association as substantial. In considering § 3(e) of the Food Stamp Act of 1964, 7 U.S.C. § 2012(e), which excludes from participation in the food stamp program any household containing an individual unrelated to any other member of that household, he observed: "[t]he right of

association, the right to invite the stranger into one's home is too basic in our constitutional regime to deal with roughshod." The majority found the statute violative of the Due Process Clause of the Fifth Amendment and therefore did not reach these questions. See, however, the opinion of Judge McGowan for the three judge court below, *Moreno* v. *United States Department of Agriculture,* 345 F.Supp. 310 at 314 (D.D.C. 1972).

[9] 42 U.S.C. § 606(a) reads in full as follows:

"(a) The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, step father, stepmother, stepbrother, stepsister uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;"

[10] 45 C.F.R. § 203.1 is set out in substance in *Lewis* v. *Martin,* 397 U.S. 552 (1970) at p. 556. It has been succeeded by 45 C.F.R. § 233.90(a), which incorporates its predecessor with relatively few changes. § 233.90(a) reads as follows:

(a) *State plan requirement.* A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's step-parent who is ceremonially married to the child's natural or adoptive parent, and is legally obligated to support the child under State law or general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment,

only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in home, of a 'substitute parent' or 'man-in-the-house' or any only such net income as is actually available for current use the absence of proof of actual contributions."

[12] Rules 14(b):

"(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

[13] By the same reasoning, permissive intervention is most appropriate where the court has determined a case unsuitable for class action treatment. Thus in *Doe* v. *Lavine*, 347 F.Supp. 357 (S.D.N.Y. 1972), Judge Gurfein granted motions to intervene by eight persons while finding that factual discrepancies precluded a class action designation. Similarly, Judge Mansfield in *Boone* v. *Wyman*, 295 F.Supp. 114 (S.D.N.Y. 1969), affd., 412 F.2d 857 (2nd Cir. 1969), cert. denied, 396 U.S. 1024 (1970), permitted intervention under Rule 24(b)2 but expressed doubt as to whether the prerequisites for a class action existed.

[14] Some courts have permitted intervention in class actions by applicants raising the same issues, and retaining the same attorneys, as the named plaintiffs. *Epstein* v. *Weiss*, 50 F.R.D. 387 (E.D.La. 1970), *Hicks* v. *Crown Zellerbach*, 49 F.R.D. 184 (E.D.La. 1968). The underlying rationale there appears to be that in such circumstances it hardly makes any difference whether intervention is permitted or denied.

[15] *Shapiro* v. *Thompson* was not, of course, a summary affirmance. But the Court made no mention of retroactive welfare benefits in its opinion, which can thus be deemed a summary affirmance on that point.

Judgment and Order.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

This cause having come on to be heard on plaintiffs' motion for a class action determination pursuant to Rule 23 of the Federal Rules of Civil Procedure and for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the motions to intervene as a party plaintiff on behalf of Phyllis D'Alessio and Loretta Clark pursuant to Rule 24 of the Federal Rules of Civil Procedure and on the motions for a preliminary injunction and a class action determination on behalf of the proposed intervenors, and on defendants' motion to dismiss the action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure or in the alternative for summary judgment, and the Court having considered the pleadings in the action, the affidavits, deposition and memoranda of law submitted by the parties herein, and the Court having heard oral argument, and due deliberation having been had thereon, and upon filing the opinion of the Court dated and filed the 3rd day of October, 1973, it is hereby

ORDERED, that defendants' motions to dismiss the action or in the alternative for summary judgment be and the same hereby are denied; and it is further

ORDERED, that the motions to intervene as party plaintiffs on behalf of Phyllis D'Alessio and Loretta Clark be and the same hereby are denied; and it is further

ORDERED, that the above-entitled action is maintainable as a class action pursuant to Rule 23 of the Federal Rules

of Civil Procedure. The class of plaintiffs consists of all residents of the State of New York who are or were or will be receiving public assistance, and who have had their grants of public assistance reduced, terminated, suspended or denied, or who are or may be threatened with reduction, termination, suspension, or denial of public assistance, solely because of the presence of a lodger in the home pursuant to 18 NYCRR §§ 352.31(a)(3)(iv) and 352.30(c) and (d); and it is further

ORDERED, that plaintiffs' motion for summary judgment be the same is granted to the extent hereinafter set forth; and it is further

ORDERED, that defendants, their officers, agents, servants, employees, and successors be and hereby are permanently enjoined from enforcing 18 NYCRR §§ 352.31(a)(3)(iv) and 352.30(c) and (d); and it is further

ORDERED, that plaintiffs' motion for a summary judgment be and the same hereby is denied to the extent it seeks an order directing the payment of retroactive welfare payments; and it is further

ADJUDGED AND DECREED, that plaintiffs are entitled to and are hereby granted a declaratory judgment in this action that 18 NYCRR §§ 352.31(a)(3)(iv) and 352.30(c) and (d) violate the federal Social Security Act, 42 U.S.C. § 601, et seq. and the regulation promulgated pursuant thereto by the Department of Health, Education and Welfare, 45 C.F.R. § 233.90; and it is further

ORDERED, that execution of this order is stayed pending a timely appeal by defendants to the Court of Appeals, Second Circuit, at which time this stay will continue pend-

ing final disposition of any or all appeals taken herein;
AB ~~provided that this stay does not include proposed intervenors Phyllis D'Alessio and Loretta Clark.~~

Dated: New York, New York October 11, 1973.

HONORABLE ARNOLD BAUMAN
United States District Judge

Judgment Entered Oct. 16, 1973.
RAYMOND F. BURGHARDT
Clerk

Amended Judgment and Order.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

This cause having come on to be heard on plaintiffs' motion for a class action determination pursuant to Rule 23 of the Federal Rules of Civil Procedure and for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the motions to intervene as a party plaintiff on behalf of Phyllis D'Alessio and Loretta Clark pursuant to Rule 24 of the Federal Rules of Civil Procedure and on the motions for a preliminary injunction and a class action determination on behalf of the proposed intervenors, and on defendants' motion to dismiss the action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure or in the alternative for summary judgment, and the Court having considered the pleadings in the action, the affidavits, deposition, and memoranda of law submitted by the parties herein, and the Court having heard oral argument, and due deliberation having been had thereon, and upon filing the opinion of the Court dated and filed the 3rd day of October 3, 1973, and defendants having called this Court's attention to errors appearing in the original Judgment and Order entered on October 16, 1973, it is

ORDERED, that this Amended Judgment and Order shall supersede for all purposes the Judgment and Order entered on October 16, 1973; and it is further

ORDERED, that defendants' motions to dismiss the action or in the alternative for summary judgment be and the same hereby are denied; and it is further

ORDERED, that the motions to intervene as party plaintiffs on behalf of Phyllis D'Alessio and Loretta Clark be and the same hereby are denied; and it is further

ORDERED, that the above-entitled action is maintainable as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class of plaintiffs consists of all residents of the State of New York who are or were or will be receiving public assistance, and who have had their grants of public assistance reduced, terminated, suspended or denied, or who are or may be threatened with reduction, termination, suspension, or denial of public assistance, solely because of the presence of a non-contributing lodger in the home pursuant to 18 NYCRR §§ 352.31(a)(3)(iv) and 352.30(d); and it is further

ORDERED, that plaintiffs' motion for summary judgment be the same is granted to the extent hereinafter set forth; and it is further

ORDERED, that defendants, their officers, agents, servants, employees, and successors be and hereby are permanently enjoined from enforcing that portion of 18 NYCRR § 352.30(d) to the extent that it provides that when a non-legally responsible person who is neither applying for nor receiving public assistance resides in a household with public assistance recipients and does not contribute at least $15 monthly; the public assistance family's shelter allowance, including fuel for heating shall be a pro rata share of the regular shelter allowance and 18 NYCRR § 352.31(a)(3)(iv) insofar as it authorizes treatment of a non-legally responsible male residing with a woman and child or children receiving public assistance and who is unwilling to assume any responsibility for the support of said woman or child or children as a non-contributing lodger under § 352.30(d); and it is further

Amended Judgment and Order.

ORDERED, that plaintiffs' motion for a summary judgment be and the same hereby is denied to the extent it seeks an order directing the payment of retroactive welfare payments; and it is further

ADJUDGED AND DECREED that plaintiffs are entitled to and are hereby granted a declaratory judgment in this action that the portion of 18 NYCRR § 352.30(d) hereinbefore described and 18 NYCRR § 353.31(a)(3)(iv) to the extent it authorizes treatment of a non-legally responsible male who is unwilling to assume responsibility for support as a non-contributing lodger under § 352.30(d) violate the Federal Social Security Act, 42 U.S.C. § 601, et seq. and the regulation promulgated pursuant thereto by the Department of Health, Education and Welfare, 45 C.F.R. § 233.90; and it is further

ORDERED, that execution of this order is stayed pending a timely appeal by defendants to the Court of Appeals, Second Circuit, at which time this stay will continue pending final disposition of any or all appeals taken herein.

Dated: New York, New York, December 17, 1973.

HONORABLE ARNOLD BAUMAN
United States District Judge

Judgment entered Dec. 18, 1973.

RAYMOND F. BURGHARDT
Clerk

Plaintiffs' Notice of Appeal to the Court of Appeals for the Second Circuit.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Notice is hereby given that Rose Hurley, on her own behalf and on behalf of her minor children Doreen Hurley, Jamie Hurley, and John Hurley, and on behalf of all others similarly situated, the plaintiffs in the above entitled action, and Phyliss D'Alessio, the proposed plaintiff-intervenor, hereby appeal to the United States Court of Appeals for the Second Circuit from that part of the final judgment and order of the United States District Court for the Southern District of New York entered in this action on the 15th day of October, 1973, denying plaintiffs' motion for summary judgment to the extent it sought an order directing defendants to pay retroactive welfare payments and to the extent it denies the motion of Phyliss D'Alessio to intervene as a party plaintiff.

Dated: October 29, 1973, White Plains, New York.

MARTIN A. SCHWARTZ
THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY

By: Martin A. Schwartz, of Counsel
Lawrence S. Kahn, of Counsel
Attorneys for Plaintiffs

To: Honorable Louis J. Lefkowitz
Attorney General of the State of New York
Attn: Judith Gordon, Esq.

Honorable John J. S. Mead
County Attorney

State Defendants' Notice of Appeal to the Court of Appeals for the Second Circuit.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Notice is hereby given that the defendants Barry Van Lare and Abe Lavine hereby appeal to the United States Court of Appeals for the Second Circuit from that part of the final order and judgment of Honorable Arnold Bauman, United States District Judge for the United States District Court of the Southern District of New York, which grants plaintiffs' motion for a class action, permanently enjoining defendants from enforcing 18 NYCRR §§ 352.31 (a)(3)(iv) and 352.30(c) and (d), declares that said regulations violate the federal Social Security Act, 42 U.S.C. § 601, *et seq.* and 45 C.F.R. § 233.90, regulations promulgated thereunder, and denies the defendants' motion to dismiss the action or in the alternative for summary judgment in defendants' favor.

The order was entered on or about October 15, 1973.

Dated: New York, New York, October 25, 1973.

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
GENE B. MECHANIC
Deputy Assistant Attorney
General

To: MARTIN SCHWARTZ, Esq.
The Legal Aid Society of
Westchester County

JOHN J. S. MEAD, Esq.
County Attorney

County Defendants' Notice of Appeal to the Court of Appeals for the Second Circuit.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Notice is hereby given that the defendant, Louis A. Kurtis, hereby appeals to the United States Court of Appeals for the Second Circuit from that part of the final order and judgment of Honorable Arnold Bauman, United States District Judge for the United States District Court of the Southern District of New York, which grants plaintiffs' motion for a class action, permanently enjoins defendant from enforcing 18 NYCRR §§ 352.31(a)(3)(iv) and 352.30(c) and (d), declares that said regulations violate the federal Social Security Act, 42 U.S.C. § 601, et seq. and 45 C.F.R. § 233.90, regulations promulgated thereunder, and denies the defendant's motion to dismiss the action or in the alternative for summary judgment in defendant's favor.

The order was entered on or about October 15, 1973.

Dated: White Plains, N.Y., October 30, 1973.

Yours, etc.,

HARRY LOTT,
County Attorney of the
County of Westchester
Attorney for Defendant Kurtis

By
Richard W. McAtamney,
Sr. Asst. County Attorney

County Defendants' Notice of Appeal to the Court of Appeals for the Second Circuit.

To: Louis J. Lefkowitz
Attorney General of the
State of New York

Attn: Gene B. Mechanic, Esq.
Martin Schwartz, Esq.
The Legal Aid Society of
Westchester County

PROCEEDINGS BEFORE THE SINGLE DISTRICT JUDGE IN *TAYLOR* v. *LAVINE*, 73 Civ. 699, E.D.N.Y.

Complaint.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

CLASS ACTION
73 Civ.

ANNIE TAYLOR, individually and on behalf of her minor dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Plaintiffs,

against

ABE LAVINE, individually and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually and in his capacity as Commissioner of the Nassau County Department of Social Services,

Defendants.

I

PRELIMINARY STATEMENT

Plaintiffs, individually and on behalf of their minor dependent children and on behalf of all persons similarly situated, seek to have this court restore plaintiffs' rights which were abrogated, denied and deprived by defendants' enforcement of Section 352.30(d) of the Regulations of the State Department of Social Services (18 N.Y.C.R.R. 352.30(d)) and to have this court declare invalid and unconstitutional and enjoin the aforecited regulation and

award retroactive benefits to all members of the class who have been aggrieved by the enforcement of this regulation. The regulation treats a nonlegally responsible relative or unrelated person living with public assistance recipients and having no legal responsibility for their support as a lodger and thereby causes a reduction or elimination of the public assistance grant despite the fact that the "lodger" contributes no money to the household. The regulation is challenged on the ground that it is in conflict with the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, and subchapter IV of the Social Security Act, 42 USC § 601 *et seq.*, and regulations promulgated thereunder by the United States Department of Health, Education and Welfare.

II

Jurisdiction

1. Jurisdiction is conferred on this Court by 28 U.S.C. 1343(3) and (4) which provide for original jurisdiction in Federal District courts for all suits authorized by 42 U.S.C. § 1983 to redress the deprivation, under color of state law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress without regard to the amount in controversy.

2. Plaintiffs' action for declaratory and injunctive relief, and for retroactive rights to public assistance is authorized by:

(a) 28 U.S.C. § 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judgments.

(b) 48 U.S.C. § 1983, which provides for redress for the deprivation under color of law of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and laws of the United States.

III

Plaintiffs

3. The named plainiffs, Annie Taylor and Charlotte Otey, are citizens of the United States and of the State of New York. They are residents of the Village of Freeport, County of Nassau, State of New York. Plaintiff, Annie Taylor, is 28 years of age and is the mother of one minor child, Margaret Taylor, 6 years of age. Plaintiff, Charlotte Otey, is 47 years of age and is the mother of one minor child, Kevin Otey, 13 years of age.

4. The plaintiffs, Margaret Taylor and Kevin Otey, are the minor dependent children of plaintiffs, Annie Taylor and Charlotte Otey, respectively. They are included in their respective mothers' public assistance grants pursuant to the federal categorical program of Aid to Families with Dependent Children.

IV

Class Action

5. The named plaintiffs bring this action individually on their own behalf and on behalf of their respective minor dependent children and on behalf of all other persons similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. The members of the class similarly situated are all residents of New York State who are or were receiving public assistance in New York and who have

had their grants reduced, terminated, suspended or denied, or who are threatened with reduction, termination, suspension or denial solely because of the enforcement of Section 352.30(d) of the Regulations of the New York State Department of Social Services (18 N.Y.C.R.R. 352.30(d)).

6. The requirements of Rule 23(a) of the Federal Rules of Civil Procedure are complied with because:

(a) The class is so numerous that joinder of all members is impractical;

(b) There is a question of law common to the class, i.e., the validity of 18 N.Y.C.R.R. 352.30(d);

(c) The claims of the named plaintiffs are typical of the claims of the class;

(d) The named plaintiffs will fairly and adequately protect the interests of the class; and

(e) The named parties opposing the class have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and declaratory relief with respect to the class as a whole.

In addition, there are questions of law and fact common to the members of the class which predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient-adjudication of the controversy.

V

Defendants

7. Defendant, Abe Lavine, as Commissioner of the New York State Department of Social Services, has primary responsibility for the administration of public assistance programs throughout the State of New York, in accordance

with the requirements of the United States Constitution, the Social Security Act, the Rules and Regulations of the Department of Health, Education and Welfare, the New York Social Services Law, and the Rules and Regulations promulgated by New York State Board of Social Welfare and Department of Social Services. He is being sued individually and in his official capacity.

8. Defendant, James M. Shuart, as Commissioner of the Nassau County Department of Social Services is mandated to administer the program of public assistance and care for which the Nassau County public welfare district is responsible and to exercise general supervision and care of persons in need in Nassau County pursuant to Section 65 of the New York State Social Services Law. He is being sued individually and in his official capacity.

VI

Factual Allegations

A. *Plaintiff Taylor*

9. Plaintiff Taylor and her minor child reside together in Freeport, New York at 168 North Main Street. They are recipients of public assistance in the federal-state AFDC program.

10. Plaintiff's sister, Virginia Taylor, age 23, also resides in the household. Prior to January 1, 1973, Virginia Taylor was receiving public assistance in the state home relief program.

11. In accordance with a written lease entered into in or about December, 1970, plaintiff Taylor is obligated to pay a monthly rental of $180.00 for the apartment in which she resides with her daughter and her sister.

12. Prior to January 1, 1973, the basic needs grants for plaintiff Taylor and her sister were based on the state-wide standard of needs for a household of three persons, with plaintiff Taylor receiving a monthly grant equivalent to two-thirds, and her sister receiving one-third, both grants reduced by a 10% state-wide rateable reduction. According to Sec. 131-a of the New York State Social Services Law, the basic needs grant is supposed to cover all recurrent items of need exclusive of shelter and fuel.

13. A shelter schedule promulgated by the Nassau County Department of Social Services, effective July 1, 1970, and filed with the New York State Department of Social Services, sets the maximum rent allowance for an apartment (with heat provided) at $145.00 for a household of one or two persons and $165.00 for three persons.

14. Pursuant to the said shelter schedule, plaintiff Taylor receives a rent allowance equivalent to ⅔ of $165.00 or $110.00. Prior to January, 1973, plaintiff's sister received a shelter allowance equivalent to ⅓ of $165.00 or $55.00. The remaining $15.00 of the monthly rental was made up from their respective basic needs grants.

15. During the months of January and February, 1973, plaintiff's sister neither received public assistance nor any other form of income. She therefore was unable and in fact did not contribute any money to the plaintiff.

16. In or about January, 1973, plaintiff requested that the Nassau County Department of Social Services provide her with a grant equivalent to the difference between a budget for two-thirds of a household of three, and a budget for a household of 2 persons. This request was approved with respect to the basic needs for plaintiff and

her daughter for the months of January and February, but not with respect to the shelter needs.

17. On February 26, 1973, plaintiff requested a state fair hearing to appeal the denial of her request for a full shelter allowance for two persons in accordance with the maximum shelter schedule, for the months beginning January, 1973.

18. A hearing was held in Mineola, New York on March 14, 1973, before a Hearing Officer designated by defendant Lavine. At the hearing, the representative of defendant Shuart did not dispute plaintiff's contention that she was receiving no money from her sister.

19. In a decision dated April 20, 1973, defendant Lavine affirmed the determination of the Nassau County Department of Social Services to allow plaintiff only $110 per month for rent on the grounds that this was in accordance with 18 N.Y.C.R.R. 352.30(d). This decision is attached hereto and made a part hereof as Exhibit A.

20. Plaintiff's sister was restored to public assistance in the federal pre-AD (presumptively Aid to the Disabled) category effective March 14, 1973. However plaintiff and her minor child continue to suffer grave and irreparable harm, injury, loss and damage through the lack of adequate funds to purchase necessities requisite for a minimum standard of living and health. Because of the two month period in which she did not receive a full shelter allowance, plaintiff is currently behind in her rent payments, thus requiring her to bear the added cost of late charges assessed in accordance with the terms of her lease. On March 23, 1973, there was a final judgment awarded in favor of plaintiff's landlord for non-payment of the balance of March rent. During the period in which the

warrant of eviction was stayed, plaintiff used money from her April grant to pay her landlord and nullify the proceeding.

B. *Plaintiff Otey*

21. Plaintiff Otey and her minor child reside together in Freeport, New York at 303 Waverly Place. They are recipients of public assistance in the federal-state AFDC program.

22. Plaintiff's adult son, Michael Otey, age 23, resides in the apartment. At all times hereinafter mentioned, Michael was unemployed, except for an occasional temporary job.

23. For some months prior to October, 1972, Michael Otey was not residing in plaintiff's household. During that period, plaintiff was receiving a maximum shelter allowance for two persons of $145.00. This was sufficient to pay her actual rent of $145.00.

24. In or about October, 1972, Michael Otey returned to live in plaintiff's apartment. Plaintiff thereupon received a notice from the Nassau County Department of Social Services, dated October 26, 1972, stating that plaintiff's public assistance grant was to be reduced for the following reason: "You must share shelter with your son, Michael Otey. Your share of shelter is $96.65."

25. On November 8, 1972, prior to the effective date of the proposed reduction, plaintiff requested a state fair hearing. In accordance with the applicable Federal and state regulations, plaintiff continued to receive a full shelter grant pending the hearing and its determination.

26. On or about the scheduled hearing date, December 4, 1972, plaintiff called the New York State Department of Social Services in Albany, and obtained a one-week adjournment to enable her to attend an out of state funeral.

27. Prior to the adjourned hearing date, Michael Otey promised plaintiff that either he would find a job and contribute to the household or else he would leave New York State to stay with relatives in West Virginia.

28. In view of the likelihood of this change in circumstances which would enable her to pay her rent, either through a partial contribution from Michael or a full shelter grant, plaintiff did not appear at the rescheduled fair hearing on December 11, 1972. She intended to inform the Nassau County Department of Social Services as soon as Michael Otey left the household or started contributing from his anticipated earnings.

29. Because of her failure to appear at the hearing, plaintiff Otey's shelter grant was reduced to two-thirds of $145.00 or $96.65, in accordance with 18 N.Y.C.R.R. 352.30(d).

30. In the month in which this reduction became effective, February, 1973, Michael Otey was still residing in plaintiff's household but not contributing any money to plaintiff. He was neither working nor receiving public assistance.

31. In order to forestall a possible eviction, the Nassau County Department of Social Services paid the landlord the $45.00 difference between the actual rental and the $100.00 which plaintiff had paid for February. However, plaintiff and her minor child continue to suffer grave and irreparable harm, injury, loss and damage through lack of

adequate funds. Plaintiff still receives only $96.65 for rent and the Nassau County Department of Social Services has proposed to recoup the $45 paid for February rent from plaintiff's future basic needs grants. If this proposed action is affirmed by the State Department of Social Services in a pending fair hearing, and undertaken each and every month, plaintiff and her minor son will soon be without any basic needs grant to purchase food and other necessities. If the proposed recoupment is disallowed by the State, the county will not provide the additional $45.00 and plaintiff will be in danger of eviction.

VII

First Cause of Action

32. Sec. 352.30(d) of the New York State Social Services Regulations provides:

> "A non legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does not contribute at least $15.00 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance."
>
> 18 N.Y.C.R.R. 352.30(d)

33. Despite the language about "pro rata share", the effect of this regulation is to assume that money is being

contributed towards the shelter needs of a public assistance family by the presence of another person in the house.

34. To base eligibility for public assistance on this presumed income is clearly inconsistent with 42 U.S.C. 601 *et seq.*, and the Federal Regulations promulgated pursuant thereto. See, e.g. 45 C.F.R. § 233.90(a) [36 F.R. 3868]:

> "(a) *State plan requirement.* A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extend [sic] that natural or adoptive parents are required to support their children. Under this requirement, *the inclusion in the family, or the presence in the home,* of a 'substitute parent' or 'man-in-the-house' *or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.*"
>
> [italics added]

Accordingly, 18 N.Y.C.R.R. 352.30(d) is in violation of the Supremacy Clause of the United States Constitution, Article VI, Clause 2.

VIII

Second cause of action

35. This regulation, 18 N.Y.C.R.R. 352.30(d), creates an irreputable presumption that any person, regardless of age, consanguinity or financial status, living in a public assistance recipient's household is a "lodger", and has the ability to provide and in fact provides the family with income equivalent to a pro rata share of the household's shelter costs. To base a reduction or denial of public assistance on this conclusive presumption is arbitrary, irrational and unfair and consequently in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

IX

Third cause of action

36. The regulation is also in violation of the equal protection clause of the Fourteenth Amendment in that it arbitrarily and irrationally creates two classes of equally needy families. One class is composed of public assistance recipients who are eligible to receive a full public assistance grant either because there is no "lodger" residing with them or because the "lodger" contributes $15 per month. The other class is composed of public assistance recipients who are otherwise fully eligible to receive full public assistance, but will receive a reduced amount of assistance because of the presence in the household of a person who is not legally obligated and in fact does not

financially support the family, but is deemed to be a "lodger".

Wherefore, plaintiffs pray on behalf of themselves and all others similarly situated that this Court:

1. Declare this action to be a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

2. Issue a preliminary and permanent injunction enjoining defendants, their employees, officers, agents, successors and all other persons in active concert and participation with them from enforcing 18 N.Y.C.R.R. 352.30(d).

3. Issue a permanent injunction mandating defendants, their employees, officers, agents, successors and all other persons in concert and participation with them to afford plaintiffs and all others similarly situated their right to the retroactive public assistance that defendants have wrongfully refused or deducted pursuant to 18 N.Y.C.R.R. 352.30(d).

4. Issue a final judgment declaring 18 N.Y.C.R.R. 352.30(d) unconstitutional and in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, the Supremacy Clause, Article VI of the United States Constitution, and the Social Security Act, 42 U.S.C. par. 601 *et seq.* and the regulations promulgated thereunder by the United States Department of Health, Education Welfare.

5. Award plaintiffs their costs, disbursements and attorneys' fees herein.

6. Award plaintiffs such other, further and different relief as to this Court may appear just and equitable.

(Verified by Annie Taylor and Charlotte Otey, May 14, 1973.)

Decision After the Fair Hearing, Exhibit "A" to Complaint.

STATE OF NEW YORK

DEPARTMENT OF SOCIAL SERVICES

In the Matter of the Appeal of

ANNIE TAYLOR,

from a determination by the Nassau County Department of Social Services (hereinafter called the agency)

A fair hearing was held at Mineola, New York on March 14, 1973, before Hyman Asherof, Hearing Officer, at which the appellant, and a representative of the agency appeared. The appeal is from a determination by the agency relating to the adequacy of appellant's grant of aid to dependent children insofar as same relates to the shelter portion of her budget. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

(1) Appellant and her daughter are recipients of aid to dependent children.

(2) Living with them is appellant's sister who is not in receipt of public assistance and who does not contribute to the rent.

(3) The maximum rent as per filed schedules for an apartment, such as appellant's, for two persons is $145 and for three persons it is $165.

(4) The agency has budgeted appellant's shelter allowance at ⅔ of $165, or $110.

Decision After the Fair Hearing, Exhibit "A" to Complaint.

(5) Appellant claims that it should be budgeted at $145, the maximum for 2 persons since the third person does not contribute anything to the rent.

Pursuant to Section 352.30(d) of the Regulations of the State Department of Social Services a non-legally responsible relation in the household who is not receiving public assistance shall be deemed a lodger. In the event the lodger does not contribute at least $15 per month, the family's shelter allowance shall be pro rata share of the regular shelter allowance. Therefore, the agency's determination to allow the appellant a shelter allowance in the amount of $110 was correct and in accordance with the above cited Regulation.

DECISION: The determination of the agency is affirmed.

Dated: Albany, New York, Apr. 20, 1973.

ABE LAVINE
Abe Lavine
Commissioner

BY CARMEN SHANG
Carmen Shang
Assistant Commissioner

Answer of State Defendant.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant Abe Lavine, individually and as Commissioner of the Department of Social Services of the State of New York, for an answer to the complaint of plaintiffs Annie Taylor, et al., by his attorney Louis J. Lefkowitz, Attorney General of the State of New York, respectfully alleges:

FIRST: Denies on information and belief each and every allegation in paragraphs "1", "2", "2(a)", "2(b)", "5", "6", "6(a)", "6(b)", "6(c)", "6(d), "6(e)", "33", "35" and "36".

SECOND: Denies knowledge or information sufficient to form a belief as to each and every allegation in paragraphs "3", "11", "12", "13", "22", "26", "27" and "30".

THIRD: With respect to the allegations in paragraph "10", denies knowledge or information sufficient to form a belief as to the age of Virginia Taylor and as to whether or not she resides in plaintiff Taylor's household.

FOURTH: With respect to the allegations contained in paragraph "14", denies knowledge or information sufficient to form a belief as to the amount of shelter allowance received by plaintiff Taylor's sister prior to January, 1973 and as to how the total actual rent for plaintiff Taylor's household was met.

FIFTH: With respect to the allegations contained in paragraph "15", denies knowledge or information sufficient to form a belief as to whether plaintiff Taylor's sister received any other form of income during January and February, 1973 and as to whether or not she was able to contribute any money to plaintiff Taylor.

SIXTH: With respect to the allegations in paragraph "20", denies on information and belief that plaintiff Taylor and her minor child have suffered or continue to suffer grave and irreparable harm, injury, loss and damage and/or that they lack adequate funds to purchase necessities requisite for a minimum standard of living and health; denies knowledge or information sufficient to form a belief as to all other allegations made therein.

SEVENTH: With respect to the allegations contained in paragraph "21", denies knowledge and information sufficient to form a belief as to whether or not plaintiff Otey and her minor child reside together at 303 Waverly Place, Freeport, New York.

EIGHTH: With respect to the allegations in paragraph "23", denies knowledge or information sufficient to form a belief as to whether or not Michael Otey was living in plaintiff Otey's household prior to October, 1972 and as to whether the $145 shelter allowance was sufficient to pay plaintiff Otey's actual rent.

NINTH: With respect to the allegations contained in paragraph "24", denies knowledge or information sufficient to form a belief as to the time when Michael Otey began living in plaintiff Otey's apartment.

TENTH: With respect to the allegations contained in paragraph "28", denies knowledge or information sufficient to form a belief as to the alleged reasons why plaintiff Otey did not appear at her re-scheduled fair hearing and as to her intentions with respect to the Nassau County Department of Social Services.

ELEVENTH: With respect to the allegations contained in paragraph "29", admit that plaintiff Otey's shelter grant was reduced to $96.65, in accordance with 18 NYCRR 352.30(d), because her failure to appear at the second scheduled fair hearing indicated her intention to abandon her claim to a higher shelter grant.

TWELFTH: With respect to the allegations contained in paragraph "31", denies on information and belief that plaintiff Otey and her minor child have suffered and/or continue to suffer grave and irreparable harm, injury, loss and damage and/or that they lack adequate funds and/or that they will be without any basic needs grant; denies on information and belief all other allegations made therein with respect to the pending decision of the New York State Department of Social Services since that decision was made on May 15, 1973 at which time the State Department reversed the decision of the Nassau County Department of Social Services and thereby disallowed the recoupment of $45 from plaintiff Otey by the County; denies knowledge or information sufficient to form a belief as to the possible future actions of the Nassau County Department of Social Services; the decision of the New York State Department of Social Services, dated May 15, 1973, is attached hereto and made a part hereof as Exhibit "A".

THIRTEENTH: With respect to the allegations contained in paragraph "32", admits only to the extent that the quoted passage is, in fact, the verbatim content of § 352.30(d) of the New York State Social Services Regulations.

FOURTEENTH: With respect to the allegations contained in paragraph "34", denies on information and belief each and every allegation made therein except to the extent that the quoted passage is, in fact, the verbatim content of 45 CFR § 233.90(a).

Answer of State Defendant.

AS AND FOR A FIRST SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE, ALLEGES THAT:

FIFTEENTH: The Court lacks jurisdiction over the subject matter of this action.

AS AND FOR A SECOND SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE, ALLEGES THAT:

SIXTEENTH: The complaint fails to state a claim upon which relief may be granted.

AS AND FOR A THIRD SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE, ALLEGES THAT:

SEVENTEENTH: This action is not properly maintainable as a class action.

AS AND FOR A FOURTH SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE, ALLEGES THAT:

EIGHTEENTH: The request for an injunction against the enforcement of 18 NYCRR § 352.30(d) is not cognizable by a single judge of the United States District Court and the complaint contains no request for a three-judge Court. 28 U.S.C. § 2281.

WHEREFORE, it is respectfully requested that the complaint be in all respects dismissed and this Court grant such further relief as shall be necessary and proper.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State Defendant
By: CONSTANCE B. MARGOLIN
CONSTANCE B. MARGOLIN
Deputy Assistant Attorney General

(Verified by Constance B. Margolin, June 25, 1973.)

Decision After Fair Hearing, Exhibit "A" to Answer of State Defendant.

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVCES

In the Matter of the Appeal of

CHARLOTTE OTEY

from a determination by the Nassau County Department of Social Services (hereinafter called the agency)

A fair hearing was held at Mineola, New York on April 13, 1973 before James I. Riley, Hearing Officer, at which the appellant, the appellant's representative and a representative of the agency appeared. The appeal is from a determination by the agency relating to the adequacy of a grant of aid to dependent children. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

(1) Appellant is a recipient of a grant of aid to dependent children for herself and her one minor dependent child. On March 20, 1973 the agency determined to reduce appellant's grant by putting her rent on voucher and recouping the sum of $45.00 which appellant owes on her February rent.

(2) Appellant received a monthly shelter allowance of $96.66. In the month of February she failed to pay a full month's rent leaving $45.00 unpaid. Her actual rent is $145.00. She failed to pay her rent in full because an adult son who lives with her failed to give her his share of the rent.

(3) No other evidence of mismanagement of cash was introduced in evidence at the hearing.

(4) The agency sent a Notice of Intent to Reduce appellant's grant on March 20, 1973 to be effective April 6, 1973. The appellant requested a fair hearing to review the agency's proposed action on March 30, 1973. The agency was notified by the State Department of Social Services that appellant's grant must be continued without change until a fair hearing decision is issued. The agency has continued assistance unchanged to the appellant through the date of this hearing, and the agency has stated that assistance will be continued until a fair hearing decision is issued.

Section 381.3(a) of the Regulations of the State Department of Social Services provides that money payments shall be restricted when the inability of a recipient to handle cash has been demonstrated. The credible evidence establishes that there has been no demonstration that appellant is unable to handle cash. A single isolated instance of failure to pay rent in full for one month is not the quality of evidence contemplated by the Regulations, especially since the evidence establishes that appellant used all of her shelter allowance and a few dollars more to make the partial rent payment she made. Furthermore, the agency may not recoup the $45.00 in unpaid rent. Section 352.7 (g) (7) of the Regulations permits recoupment of a duplicate rent payment when the advance allowance for rent is made for the purpose of avoiding eviction. Appellant was not threatened with eviction and the agency made no advance allowance to avoid eviction. Accordingly, the agency erred in determining to place appellant's rent on restricted payments and it also erred in determining to reduce appellant's grant to recover the unpaid rent.

DECISION: The determinations of the agency are not and cannot be affirmed. The agency is directed to take appro-

Decision After Fair Hearing, Exhibit "A" to Answer of State Defendant.

priate action in accordance with the foregoing decision. The agency is further directed to report on its actions taken pursuant to this decision to the Metropolitan Office (fair hearing section) of the State Department of Social Services in accordance with the provisions of Section 358.22 of the Regulations of the State Department of Social Services.

Dated: Albany, New York
May 15 1973

ABE LAVINE
Abe Lavine
Commissioner

By CARMAN SHANG
Carmen Shang
Assistant Commissioner

Answer of County Defendant.

[SAME TITLE]

The defendant, James M. Shuart, individually and in his capacity as Commissioner of the Nassau County Department of Social Services, appearing herein by his attorney, Joseph Jaspan, County Attorney of Nassau County, for his answer to the verified complaint herein, respectfully alleges:

AS TO PLAINTIFFS' ALLEGATION OF JURISDICTION

FIRST: Upon information and belief, denies each and every allegation contained in paragraph marked "1" of the complaint except leaves for construction by the Court the legal conclusions alleged therein.

SECOND: Upon information and belief, denies each and every allegation contained in paragraph marked "2" "(a)" and "(b)" of the complaint except leaves for construction by the Court the legal conclusions alleged therein.

AS TO PLAINTIFFS' ALLEGATIONS OF PLAINTIFFS

THIRD: Denies that he has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered "3" of the complaint.

AS TO PLAINTIFFS' ALLEGATIONS OF CLASS ACTION

FOURTH: Upon information and belief, denies each and every allegation contained in paragraph numbered "5" of the complaint.

FIFTH: Upon information and belief, denies each and every allegation contained in paragraph numbered "6" and

subdivisions "(a)", "(b)", "(c)", "(d)" and "(e)" of paragraph "6" of the complaint.

AS TO PLAINTIFFS' ALLEGATIONS OF FACTUAL ALLEGATIONS

A. *Plaintiff Taylor*

SIXTH: Denies that he has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraphs numbered "11", "15", and "18" of the complaint.

SEVENTH: Upon information and belief, denies each and every allegation contained in paragraphs numbered "16" and "20" of the complaint.

B. *Plaintiff Otey*

EIGHTH: Upon information and belief, denies each and every allegation contained in paragraph "21" of the complaint except admits that plaintiff Otey and her minor child reside together in Freeport, New York at 30 Waverly Place, and are recipients of public assistance in the federal-state AFDC program.

NINTH: Denies that he has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in pargraph numbered "23" of the complaint except admits that plaintiff Otey was given her full budget allotment until January of 1973.

TENTH: Denies that he has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraphs numbered "26", "27", "28" and "30" of the complaint.

ELEVENTH: Upon information and belief, denies each and every allegation contained in paragraph numbered "31" of the complaint.

ANSWERING THE FIRST ALLEGED CAUSE OF ACTION, DEFENDANT, SHUART, ALLEGES AS FOLLOWS:

TWELFTH: Upon information and belief, denies each and every allegation contained in paragraphs numbered "33" and "34" of the complaint.

ANSWERING THE SECOND ALLEGED CAUSE OF ACTION, DEFENDANT, SHUART ALLEGES AS FOLLOWS:

THIRTEENTH: Upon information and belief, denies each and every allegation contained in paragraph numbered "35" of the complaint.

ANSWERING THE THIRD ALLEGED CAUSE OF ACTION, DEFENDANT, SHUART, ALLEGES AS FOLLOWS:

FOURTEENTH: Upon information and belief, denies each and every allegation contained in paragraph numbered "36" of the complaint.

AS AND FOR A FIRST, SEPARATE, COMPLETE AND AFFIRMATIVE DEFENSE, DEFENDANT, SHUART, ALLEGES, UPON INFORMATION AND BELIEF, AS FOLLOWS:

FIFTEENTH: 18 NYCRR 352.30 (d) is part of the State Plan under Title IV of the Social Security Act.

SIXTEENTH: Said regulation has therefore been approved by the Secretary of the United States Department of Health, Education and Welfare.

SEVENTEENTH: The United States Department of Health, Education and Welfare is an indispensable party to this action.

Answer of County Defendant.

AS AND FOR A SECOND, SEPARATE, COMPLETE AND AFFIRMATIVE DEFENSE, DEFENDANT, SHUART, ALLEGES, UPON INFORMATION AND BELIEF, AS FOLLOWS:

EIGHTEENTH: Sections 20(3-d) and 34 of the Social Services Law of New York State mandate compliance by defendant Shuart with 18 N.Y.C.R.R. 352.30(d). The plaintiffs are essentially seeking a declaration of the unconstitutionality of the aforementioned regulation and defendant Shuart is therefore not a proper or necessary party to this action.

AS AND FOR A THIRD, SEPARATE, COMPLETE AND AFFIRMATIVE DEFENSE, DEFENDANT, SHUART, ALLEGES, UPON INFORMATION AND BELIEF, AS FOLLOWS:

NINETEENTH: This action is not properly maintainable as a class action as the plaintiffs have failed to show in their action that the class is so numerous that joinder of all members is impracticable, that there are questions of law or fact common to the class, that the claims or defenses of the representative parties are typical of the claims or defenses of the class and that the representative parties would fairly and adequately protect the interests of the class.

WHEREFORE, defendant, James M. Shuart, individually and in his capacity as Commissioner of the Nassau County Department of Social Services demands judgment dismissing the complaint.

JOSEPH JASPAN
County Attorney of Nassau County

by JAMES N. GALLAGHER
Deputy County Attorney
Attorney for Defendant Shuart

Notice of Motion for Summary Judgment on Behalf of Annie Taylor and Charlotte Otey.

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that plaintiffs will bring the annexed motion for summary judgment on for hearing before this Court at Court Room 10, United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the 11th day of September, 1973, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: Hempstead, New York, August 23, 1973.

Yours, etc.,

LEONARD S. CLARK
By: THEODORE HOCHSTADT, Of Counsel
Nassau County Law Services Committee, Inc.
Attorney for Plaintiffs
285 Fulton Avenue
Hempstead, New York 11550
(516) 292-8100

To: LOUIS J. LEFKOWITZ, Esq.
Attorney General of New York
Attorney for Defendant Lavine
2 World Trade Center Plaza
New York, New York

JOSEPH JASPAN, Esq.
County Attorney of Nassau County
Attorney for Defendant Shuart
1 West Street
Mineola, New York

Motion for Summary Judgment.

[SAME TITLE]

Plaintiffs move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, that it grant the following relief:

1. An order pursuant to Rule 23 of the Federal Rules of Civil Procedure determining that this action may properly proceed as a class action.

2. A preliminary and permanent injunction enjoining defendants, their employees, officers, agents, successors and all other persons in active concert and participation with them from enforcing 18 NYCRR 352.30(d) on the ground that this regulation violates the Social Security Act, 42 U.S.C. para. 601 *et seq.*, and the regulations promulgated thereunder by the United States Department of Health, Education and Welfare.

3. A permanent injunction mandating defendants, their employees, officers, agents, successors and all other persons in active concert and participation with them to afford plaintiffs and all others similarly situated their right to public assistance which defendants have wrongfully refused or reduced pursuant to 18 NYCRR 352.30(d).

The grounds of this motion are that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law for the reasons set forth in the annexed affidavit and the memorandum of law filed herewith.

LEONARD S. CLARK
By: THEODORE HOCHSTADT,

Of Counsel
Nassau County Law Services
Committee, Inc.
Attorney for Plaintiffs

Affidavit of Theodore Hochstadt in Support of Motion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

THEODORE HOCHSTADT, being duly sworn, deposes and says:

1. I am of counsel to the attorney of record for the plaintiffs and submit this affidavit in support of plaintiffs' motion for summary judgment pursuant to § 56 of the Federal Rules of Civil Procedure.

2. This action was commenced by filing a verified complaint on May 17, 1973. A summons and complaint were served upon the defendants and upon the Attorney General of New York State on the same date. The answer of defendant James M. Shuart was served on or about June 4, 1973 and the answer of defendant Abe Lavine was served on or about June 25, 1973. Interrogatories, annexed herewith, were served upon the defendants on May 31, 1973. In his answer to the interrogatories, verified by Carmen Shang on July 10, 1973, defendant Lavine fails and refuses to analyze the notices and decisions in the possession of his Department to provide answers to questions 2(c)(d)(a) and 4(a)(b). In his answer to the Interrogatories, verified on August 13, 1973, defendant Shuart fails and refuses to provide answers to questions 1(b)(c) and 2. Nevertheless, for the reasons set forth in this affidavit and the memorandum of law submitted herewith, an order pur-

suant to Rule 37, Fed. R. Civ. P. has not been requested since plaintiffs are entitled to summary judgment.

3. This action seeks declaratory and injunctive relief in order to invalidate and enjoin the continued implementation of 18 NYCRR 352.30(d) on the ground that it violates the applicable Federal statute (42 U.S.C. 601 *et seq.*) and Federal regulation 45 C.F.R. § 233.90(a)) and the Due Process and Equal Protection clauses of the Fourteenth Amendment in that said state regulation effectuates a reduction in public assistance shelter grants without any finding that public assistance recipients' needs have decreased or that their income has increased.

4. Defendants' answers do not deny the essential facts of plaintiffs' claim, to wit:

(a) Plaintiffs are recipients of public assistance in the Federal AFDC category who reside with their minor children.

(b) Non-legally responsible relatives who are not recipients of public assistance are residing in plaintiffs' households.

(c) At no time have the defendants had evidence to indicate that the relatives are contributing toward the rent or other household expenses nor have they even claimed that the relatives are contributing.

(d) Pursuant to the subject regulation, 18 NYCRR 352.30(d), plaintiffs have been furnished a shelter allowance based on a pro rata share of the County Department shelter schedule for the total number of persons in the household, or the actual rental if lower, rather than a shelter allowance based solely on the number of public assistance recipients in the household in accordance with the shelter schedule.

5. Our memorandum of law submitted herewith sets forth the legal basis for plaintiffs' motion and replies to the affirmative defenses raised by defendants.

6. With respect to plaintiff Charlotte Otey, your affiant has been informed by her landlord, the Freeport Urban Renewal Agency, that her rent delinquency is continuing to increase at the rate of $48.34 per month. See letter dated July 10, 1973, annexed hereto as Exhibit "A". This represents the one-third share of plaintiff's $145 per month rent which the defendant Shuart has not been paying by virtue of his implementation of the subject state Social Services Regulation.

7. In compliance with the Order of this Court, dated August 6, 1973, your deponent discussed the possibility of settlement of this action in telephone conversations on August 22, with Constance Margolin, Assistant Attorney General, of the office of Louis J. Lefkowitz, attorney for defendant Lavine, and Morton Meltzer, Deputy County Attorney, of the office of Joseph Jaspan, attorney for defendant Shuart. It was recognized, however, that settlement would not be possible since the parties are not willing to alter their positions with respect to the validity of the state-wide administrative regulation at issue. Your deponent informed the attorneys for the defendants that he would soon be serving them with a motion for summary judgment, returnable on September 11, 1973.

8. No prior application has been made for the relief requested herein.

WHEREFORE, it is respectfully requested that summary judgment be made and entered in favor of plaintiffs on the grounds that there is no genuine issue of any material fact and that plaintiffs are entitled to a judgment as a matter of law.

(Sworn to by Theodore Hochstadt,
August 23, 1973.)

Letter From Justin B. Stone to Theodore Hochstadt, Exhibit "A" to Hochstadt Affidavit.

(EMBLEM)

FREEPORT
Urban Renewal Agency

200 E. Sunrise Highway, Freeport, New York 11520
Telephone 516 878-4432, 4350, 4000 ext 203

James R. Dunne — Executive Director

July 10, 1973

Mr. Theodore Hochstadt—Attorney
Nassau County Law Services
285 Fulton Street
Hempstead, New York 11550

Dear Sir:

As per your request today I am enclosing a copy of the ledger sheet of Charlotte Otey of 30 Waverly Place, Freeport, N. Y.

You will note that her rent is $145.00 per month and she became delinquent at the end of April by $48.34, Social Services pays her rent directly to us in the amount of $96.66 which is the exact difference. Her delinquency therefore is increasing at the rate of $48.34 per month.

Her delinquency of $145.02 at the end of June will become $193.36 at the end of July.

Very truly yours,

JUSTIN B. STONE
Justin B. Stone
Fiscal Manager

JBS:jr

Notice of Cross-Motion to Dismiss Complaint and for Summary Judgment on Behalf of State Defendants.

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the complaint and all the papers heretofore had herein, including the annexed memorandum of law, the undersigned will move this Court, before Judge Jack B. Weinstein, at Room , United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the 17th day of September, 1973 at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure dismissing the action on the respective grounds that the Court lacks jurisdiction over the subject matter and that the complaint fails to state a claim upon which relief can be granted.

PLEASE TAKE FURTHER NOTICE that the defendant Lavine demands, in the alternative, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, that the Court grant a summary judgment in defendant's favor on the statutory and pendent claim alleged.

Dated: New York, New York, September 13, 1973.

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants

Memorandum and Order of District Judge Jack B. Weinstein.

To: LEONARD S. CLARK, Esq.
Nassau County Law Services
Committee, Inc.
Attorney for Plaintiffs

VINCENT ESPOSITO, Esq.
Nassau County Attorney's Office
Attorney for Defendant Shuart

Memorandum and Order of District Judge Jack B. Weinstein.

[SAME TITLE]

Plaintiffs, for themselves and others similarly situated, move for summary judgment; defendants move to dismiss on the grounds of lack of jurisdiction and failure to state a claim upon which relief can be granted. Plaintiffs' motion must be granted.

Annie Taylor's rent allowance has been reduced by one-third on the presumption that her sister, who lives with her, is contributing to its payment. Charlotte Otey has had her rental allowance reduced by one-third on the presumption that her son, who lives with her, is contributing to household expenses. There is no evidence of such contributions by those adults living in plaintiffs' homes.

The ruling is said to be required by New York State Welfare Regulation 18, N.Y.C.R.R. 352.30(d) reading in

Memorandum and Order of District Judge Jack B. Weinstein.

part as follows:

> "A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be in the budget and shall be deemed to be a lodger or boarding lodger. . . . In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance." 18 NYCRR 352.30(d) (1st and 4th sentences.)

This regulation, incorporating as it does a presumption of financial support having no basis in fact, is alleged to be inconsistent with the applicable federal regulation, 45 C.F.R. 233.90(a), 36 Fed. Reg. 3868, reading as follows:

> "A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the employment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law or general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home of a 'substitute parent' or 'man-in-the-house' or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the avail-

ability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contribution."

Almost identical claims were before the District Court for the Southern District of New York, *Hurley* v. *VanLare*, 72-C-3423. The *Hurley* case involved a non-related male sharing the home. In a full opinion dated October 3, 1973 Judge Bauman ruled that the action was properly brought on behalf of a class and that the New (COPY MISSING?) with federal law. See Appendix A, attached. The opinion is convincing and its reasoning on class action status, jurisdiction, inconsistency of the state regulation and injunctive relief is adopted by this court.

The class in *Hurley* can be construed as including the class in the instant case. If it is not, then a fortiori the plaintiffs before us are entitled to injunctive relief since it is no more likely that a sister or a son will share in the support of a household than will an adult unrelated cohabitating male.

The issue of retroactive benefits is more difficult. As plaintiffs admit (Brief pp. 29-30), the Second Circuit, unlike other circuits, denies retroactive benefits. Judge Bauman, as I do, felt bound by the rule of this Circuit. Were it open to the court, it would adopt what it considers the fairer rule, permitting the court to order retroactive payments where the family, and particularly the children, are continuing to suffer because of the deprivation. It is well known that rents must be paid and that given a fixed

allowance and a rising rent or a fixed rent and a decreasing allowance, poor families will have to reduce expenditures for such necessities as food or clothing. It may well be that in the instant case there has been, for example, skimping on purchases of winter clothing or blankets for the children in order to make up the one-third rental allowance deficit. This may well adversely affect their health during the coming winter when, we can judicially notice, fuel will be short in this area.

The defenants are urged to reexamine the situation of the plaintiffs to insure that there will be no adverse consequences to the children involved as a result of the failure of this court to order retroactive benefits.

Settle order on forty-eight hours notice.

So ordered.

Dated: Brooklyn, New York
October 10, 1973

JACK B. WEINSTEIN
U.S.D.J.

Judgment and Order.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

This cause having come on to be heard on plaintiffs' motion for a class action determination pursuant to Rule 23 of the Federal Rules of Civil Procedure and for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and on defendants' motion to dismiss the action pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, or in the alternative for summary judgment, and the Court having considered the pleadings in the action, the affidavits, interrogatories and memoranda of law submitted by the parties herein, and the Court having heard oral argument, and due deliberation having been had thereon, and upon filing the opinion of the Court dated the 10th day of October, 1973, and filed the 11th day of October, 1973, it is hereby

ORDERED, that defendants' motions to dismiss the action, or in the alternative for summary judgment, be and the same hereby are denied; and it it is further

ORDERED, that the above-entitued action is maintainable as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class of plaintiffs consists of all residents of the State of New York who are, or were, or will be, receiving public assistance and who have had their grants of public assistance reduced, terminated, suspended or denied, or who are or may be threatened with reduction, termination, suspension or denial of public assistance, solely because of the presence of a lodger in the home pursuant to 18 N.Y.C.R.R. § 352.30(d); and it is further

Judgment and Order.

ORDERED, that plaintiffs' motion for summary judgment be, and the same is, granted to the extent hereinafter set forth; and it is further

ORDERED, that defendants, their officers, agents, servants, employees and successors be, and hereby are, permanently enjoined from enforcing 18 N.Y.C.R.R. § 352.30(d); and it is further

ORDERED, that plaintiffs' motion for a summary judgment be, and the same hereby is, denied to the extent it seeks an order directing the payment of retroactive welfare payments; and it is further

ADJUDGED AND DECREED, that plaintiffs are entitled to, and are hereby granted, a declaratory judgment in this action that 18 N.Y.C.R.R. § 352.30(d) violates the Federal Social Security Act, 42 U.S.C. § 601, *et seq.*, and the regulations promulgated pursuant thereto by the Department of Health, Education and Welfare, 42 C.F.R. § 233.90; and it is further

ORDERED, that execution of this order is stayed for one week pending application by defendants to the Court of Appeals, Second Circuit, from an additional stay pending final disposition of any or all appeals taken herein. In view of the lack of retroactivity and the fact that aid to dependent children is hardly above subsistence level, the children should not bear the risk of reversal during the months it may take to decide this matter.

Dated: New York, New York, October 23, 1973.

JACK B. WEINSTEIN
HONORABLE JACK B. WEINSTEIN
United States District Judge

Amended Judgment and Order.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

This cause having come on to be heard on plaintiffs' motion for a class action determination pursuant to Rule 23 of the Federal Rules of Civil Procedure and for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and on defendants' motion to dismiss the action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure or in the alternative for summary judgment, and the Court having considered the pleadings in the action, the affidavits, interrogatories, and memoranda of law submitted by the parties herein, and the Court having heard oral argument, and due deliberation having been had thereon, and upon filing the opinion of the Court dated October 10, 1973, and filed on October 11, 1973, and defendants having called this Court's attention to errors appearing in the original Judgment and Order entered on October 24, 1973; it is

ORDERED, that this Amended Judgment and Order shall supersede for all purposes the Judgment and Order entered on October 24, 1973; and it is further

ORDERED, that defendants' motions to dismiss the action or in the alternative for summary judgment be and the same hereby are denied; and it is further

ORDERED, that the above-entitled action is maintainable as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class of plaintiffs consists of all

residents of the State of New York who are or were or will be receiving public assistance, and who have had their grants of public assistance reduced, terminated, suspended or denied, or who are are or may be threatened with reduction, termination, suspension, or denial of public assistance, solely because of the presence of a non-contributing lodger in the home pursuant to 18 NYCRR § 352.30(d); and it is further

ORDERED, that plaintiffs' motion for summary judgment be the same is granted to the extent hereinafter set forth; and it is further

ORDERED, that defendants, their officers, agents, servants, employees, and successors be and hereby are permanently enjoined from enforcing that portion of 18 NYCRR § 352.30 (d) to the extent that it provides that when a non-legally responsible person who is neither applying for nor receiving public assistance resides in a household with public assistance recipients and does not contribute at least of $15, the public assistance family's shelter allowance including fuel for heating shall be a pro rata share of the regular shelter allowance; and it is further

ORDERED, that plaintiffs' motion for a summary judgment be and the same hereby is denied to the extent it seeks an order directing the payment of retroactive welfare payments; and it is further

ADJUDGED AND DECREED that plaintiiffs are entitled to and are hereby granted a declaratory judgment in this action that the portion of 18 NYCRR § 352.30(d) hereinbefore described violates the Federal Social Security Act, 42 U.S.C. § 601, et seq. and the regulation promulgated pursuant thereto by the Department of Health, Education and Welfare, 45 C.F.R. § 233.90; and it is further

ORDERED, that execution of this order is stayed for one week pending application by defendants to the Court of Appeals, Second Circuit, for an additional stay, pending final disposition of any or all appeals taken herein. In view of the lack of retroactivity and the fact that aid to dependent children is hardly above subsistence level, the children should not bear the risk of reversal during the months it may take to decide this matter.

Dated: New York, New York
December 18, 1973

s/
HONORABLE JACK B. WEINSTEIN
United States District Judge

Filed
11 AM
Dec 18, 1973

State Defendant's Notice of Appeal to Court of Appeals for the Second Circuit.

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that defendant Abe Lavine hereby appeals to the United States Court of Appeals for the Second Circuit from an order of the United States District Court for the Eastern District of New York, dated October 23, 1973, enjoining defendant Lavine from enforcing 18 N.Y.C.R.R. § 352.30(d) and declaring 18 N.Y.C.R.R. § 352.30(d) in violation of the Federal Social Security Act,

42 U.S.C. § 601, *et seq.*, and in violation of the regulations promulgated pursuant thereto by the Department of Health, Education and Welfare, 42 C.F.R. § 233.90, and from each and every part of said order, except defendant Lavine does not appeal from that part of the order which denies plaintiffs' motion for a summary judgment directing the payment of retroactive welfare benefits.

Dated: New York, New York
October 25, 1973

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant Lavine

.....

CONSTANCE B. MARGOLIN
Deputy Assistant Attorney
General

To: LEONARD S. CLARK, Esq.
Nassau County Law Services
Committee, Inc.

VINCENT M. ESPOSITO, Esq.
Office of the County Attorney

PROCEEDINGS BEFORE THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN THE CONSOLIDATED APPEALS OF TAYLOR v. LAVINE, DOC. NO. 73—2731, AND HURLEY v. VAN LARE, DOC. NO. 73—2671

Letter From David S. Kellogg to Borge Varmer Submitted by State Appellants.

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES
1450 Western Avenue
Albany, New York 12203

ABE LAVINE
Commissioner
FELIX INFAUSTO
Deputy Commissioner

December 4, 1973

Borge Varmer
Regional Attorney
Social & Rehabilitation Service
Region II
Department of HEW
26 Federal Plaza
New York, New York 10007

Dear Mr. Varmer:

Pursuant to our conversation of last week, I am requesting an opinion by your office on the legitimacy of 18 NYCRR 352.31(d) [352.30(c) and (d)]. Specifically, the questions for which I am requesting an answer are the following:

1) Is a state policy of pro-rating a shelter allowance so as to reflect the percentage of public assistance recipients residing in a household valid under 45 CFR 233.90?

2) If a state grants a full shelter allowance to an AFDC (ADC) recipient who has persons not in receipt of public assistance residing with him, is

Letter From David S. Kellogg to Borge Varmer Submitted by State Appellants.

the total expenditure thus made reimbursable to the same extent as a shelter allowance made to an AFDC household consisting entirely of recipients?

As you are aware, I am asking these questions in connection with this Department's position in the case of *Hurley* v. *Lavine*. As the appeal in the case is in an advanced stage, I sincerely implore you to expedite your reply as much as possible.

Sincerely yours,

DAVID S. KELLOGG
Senior Attorney
New York State Department
of Social Services

Letter From Elmer W. Smith to David S. Kellogg Submitted by State Appellants.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Region II
Federal Building
26 Federal Plaza
New York, New York 10007

SOCIAL AND REHABILITATION SERVICE

January 15, 1974

Mr. David S. Kellogg, Esq.
Senior Attorney
New York State Department
of Social Services
1450 Western Avenue
Albany, New York 12203

Dear Mr. Kellogg:

This is in response to your letter of December 4, 1973, to the Regional Attorney, requesting this Department's interpretation of the validity of the New York State regulation 18 NYCRR 352.30(c) and (d). Since you raise a policy question the matter was referred to this office.

Specifically you asked:

"1) Is a state policy of pro-rating a shelter allowance so as to reflect the percentage of public assistance recipients in a household valid under 45 CFR 233.90?

2) If a State grants a full shelter allowance to an AFDC (ADC) recipient who has persons not in receipt of public assistance residing with him, is the total expenditure thus reimbursable to the

Letter From Elmer W. Smith to David S. Kellogg Submitted by State Appellants.

same extent as a shelter allowance made to an AFDC household consisting entirely of recipients?"

In response to your first question, HEW has permitted states to prorate shelter allowances to reflect the percentage of public asistance recipients in a household. Such a proration is not considered an assumption of income, but rather a recognition that per-individual costs decrease as the number of individuals living together increases.

In response to your second question, it has been the policy of HEW to allow federal matching for AFDC shelter payments when a state grants a full shelter allowance to an AFDC recipient who has persons not in receipt of public assistance residing with him.

Sincerely yours,

ELMER W. SMITH
Regional Commissioner

Opinions of the Court of Appeals for the Second Circuit.

HAYS, *Circuit Judge*:

This court is again called upon to pass on a challenge to New York's administration of its program for state Aid to Families with Dependent Children (AFDC).

The federal AFDC program found in sections 401 to 444 of the Social Security Act of 1935, as amended, 42 U.S.C. §§ 601-644 (1970), provides financial aid to states on a matching funds basis to assist the "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . . .", 42 U.S.C. § 606(a) (1970). Each state wishing to qualify for sums appropriated by Congress must submit a plan for "aid and services to needy families with children," 42 U.S.C. § 601 (1970). The plan must contain each provision on the list set forth in section 402(a) of the Social Security Act and must be approved by the Secretary of Health, Education and Welfare, 42 U.S.C. § 602(b) (1970). Among the requirements found in section 402(a) are that the state plan furnish aid "with reasonable promptness to all eligible individuals," 42 U.S.C. § 602(a)(10) (1970), and that the state agency in determining need "take into consideration any other income and resources of any child or relative claiming aid to families with dependent children." 42 U.S.C. § 602(a)(7) (1970). New York has submitted such a plan and from time to time amended it. The plan and amendments have been approved by the Secretary.

Among the New York regulations under which AFDC funds are distributed are 18 N.Y.C.R.R. § 352.30(d), which reduces the maximum shelter allowance available to a recipient family pro rata to the extent that there are non-eligible lodgers living in the household, and 18 N.Y.C.R.R. § 352.31(a)(3)(iv), which treats a man living with a fe-

male recipient but not married to her as a "lodger." Plaintiffs Hurley, Taylor and Otey challenged these regulations in separate actions in two federal district courts as creating a conclusive presumption offensive to due process, as denying them the equal protection of the laws, and as invading their rights to privacy and free association. They also claimed that the regulations are in effect "substitute parent" regulations forbidden for state plans by section 406(a) of the Social Security Act and 45 C.F.R. § 233.90(a) (1973). The single district judge upheld the statutory claims and thus found it unnecessary to consider whether a court of three judges should be convened under 28 U.S.C. § 2881.

The New York regulations in question provide as follows:

> "When a female applicant or recipient is living with a man to whom she is not married . . . his available income and resources shall be applied in accordance with the following:
>
> • • •
>
> "(iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(d)."[1] 18 N.Y.C.R.R. § 352.31(a)(3).

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[1] In the version of 18 N.Y.C.R.R. before the district courts, 18 N.Y.C.R.R. § 352.31(a)(3)(iv) referred to section 352.30(c), rather than to section 352.30(d). The *Hurley* district court held that the reference was erroneous, that it should have been to section 352.30(d). —— F. Supp. ——at n.1. Appellants, state officials entrusted with administering the regulation, did not contest that determination. The text of section 352.31(a)(3)(iv) was amended effective April 2, 1973, to refer to section 352.30(d).

> "A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. . . . In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance." 18 N.Y.C.R.R. § 352.30(d).

45 C.F.R. § 233.90(a) (1973) provides as follows:

> "A State plan under title IV-4 of the Social Security Act [relating to the AFDC program] must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extend [sic] that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a 'substitute parent' or 'man-in-the-house' or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current

use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions."

The district court in each of the two cases found the New York regulations offensive to the Social Security Act and 45 C.F.R. § 233.90(a), and accordingly granted declaratory and injunctive relief. We reverse and remand for the convening of a three-judge court to consider the constitutional issues raised by the appellees.

I.

The facts in both cases are uncontroverted.

A. *Hurley* v. *Van Lare.*

Appellee Rose Hurley lives with her three dependent children, aged ten, five and five years, in Mount Vernon, New York. She and her children have been living apart from her husband since 1967; she has had no contact with him since 1967 and does not know where he is. The Hurleys receive public assistance under the New York AFDC plan as it is administered by the Westchester County Department of Social Services.

During the four-month period from November 1970 to February 1971, an unrelated male friend of Mrs. Hurley stayed with her and her children at their Mount Vernon residence. The friend was under no legal obligation to support the Hurleys, and in fact he made no contribution to their support. His presence did not increase the amount of rent that Hurley was obliged to pay, $150.00 per month. During the same four-month period, the Westchester Department of Social Services deducted $35 per month from Hurley's recurring AFDC grant, presumably in accordance with 18 N.Y.C.R.R. § 352.30(d).

On November 12, 1970, Hurley requested a "Fair Hearing," a proceeding provided for in 18 N.Y.C.R.R. §§ 358.1-358.27, to review the reduction of her AFDC grant. A hearing was held on March 22, 1971, and on September 20, 1971, appellant Van Lare, the Acting State Commissioner of the Department of Social Services, rendered a "Decision after Fair Hearing" in which he found the facts to be substantially as stated above. He upheld the determination of the Westchester County Department that Hurley's grant should be reduced, but diminished the amount of the reduction to $30.00.

Thereafter, on August 11, 1972, Hurley brought an action in the District Court for the Southern District of New York on behalf of herself and all others similarly affected by sections 352.31(a)(3)(iv) and 352.30(d) to secure declaratory relief, an injunction against enforcement of the regulations, and judgment for retroactive AFDC payments.

Defendants Van Lare and Lavine, appellants here, are respectively Acting Commissioner and Commissioner of the Department of Social Services of New York, and defendant Kurtis is Commissioner of Social Services for Westchester County.

Hurley based her demand for an injunction on the theory that she has not associated with her friend out of fear that her public assistance grant will be reduced, as it was in November 1974, by the enforcement of sections 352.31(a)(3)(iv) and 352.30(d). She contended that the regulations are offensive to the Due Process and Equal Protection Clauses of the Fourteenth Amendment, that they are in violation of her rights of privacy and free association, and that they are invalid under section 402 and 406 of the

Social Security Act, 42 U.S.C. §§ 602, 606 (1970), and 45 C.F.R. § 233.90(a).

The district court did not convene a three-judge court under 28 U.S.C. § 2284 (1970) to consider the merits of the constitutional claims. See 28 U.S.C. § 2281 (1970). But the district court determined that at least the Due Process claim is sufficiently substantial to vest the court with subject matter purisdiction under 28 U.S.C. § 1343(3) (1970), and that under the doctrine of pendent subject matter jurisdiction it had the power to decide the statutory claim.

On Hurley's motion for summary judgment, the district court held that the New York regulations violate section 406 of the Social Security Act and 45 C.F.R. § 233.90(a), as interpreted by the Supreme Court in *King* v. *Smith,* 392 U.S. 309 (1968), and *Lewis* v. *Martin,* 397 U.S. 552 (1970):

> "[T]he inevitable result of these regulations is to reduce, perhaps drastically, the stipend for those who are eligible. In the case of a mother with one child, for example, the presence of a non-contributing male lodger would reduce the rental stipend by 33⅓%. This devasting reduction means in practice that rental payments must be met out of that portion of the welfare stipend allotted for food and clothing.
>
> "The [New York] regulations thus conflict directly with § 233.90. . . . Despite the defendants' protestations to the contrary, a *pro rata* reduction does indeed assume that the male lodger will pay his own way, whether or not he actually does. That is precisely the assumption found impermissible in *King* and *Lewis.*" —— F. Supp. at ——.

In granting summary judgment, the district court gave declaraotry relief and enjoined appellants from enforcing the challenged regulations, but denied Hurley's claim for retroactive welfare payments.[2] The district court also granted Hurley's motion that the action be designated a class action under Rule 23(c).

The appellants have appealed the order granting the summary judgment and class action motions, and Hurley has appealed the denial of retroactive benefits.

B. *Taylor and Otey* v. *Lavine.*

Annie Taylor, her six-year-old child, and her sister, Virginia Taylor, live together in Freeport, Long Island. Annie Taylor and her child receive public assistance under the New York AFDC program as it is administered by the Nassau County Department of Social Services. Prior to January 1, 1973, the sister had received aid under the state home relief program, but after that date she received no public assistance. The sister is under no legal obligation to support Annie Taylor or her child, and she in fact makes no contribution to Taylor's $180 monthly rental.

Prior to January 1, 1973, the three Taylors were receiving $155 per month in shelter allowance, the maximum allowance available for a household of three persons according to a schedule issued by the Nassau County Department of Social Services. When the sister was dropped from the home relief program, Annie Taylor's shelter allowance was reduced to $110.00, two-thirds of $155, under 18 N.Y.C.R.R. § 352.30(d). Taylor requested the maximum shelter allowance for two persons, $145.00. Her request was denied. She demanded and received a "Fair Hearing" at which facts were found substantially in accordance with

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[2] The district courts properly denied retroactive payments, relying on our decision in *Rothstein* v. *Wyman,* 467 F.2d 226, 235 (2d Cir. 1972), cert. denied, 411 U.S. 921 (1973), which has recently been approved by the Supreme Court in *Edelman* v. *Jordan,* —— U.S. ——, 42 U.S.L.W. 4419, 4423 (Mar. 25, 1974.

the foregoing statement. Because the diminished shelter allowance was not enough to pay her rent, Taylor fell behind in her rental payments and was eventually the subject of an eviction order.[3]

Plaintiff Charlotte Otey and her thirteen-year-old son, like the Taylors, reside in Freeport, and are recipients of AFDC aid. When Otey's 23-year-old son, not a public assistance recipient, moved into the Otey apartment in October, 1972, Otey's shelter allowance was reduced from $145.00, the maximum allowance for two people, to $96.65, two-thirds of the maximum. Otey demanded an opportunity for a "Fair Hearing," which was granted, but she failed to appear.

Taylor and Otey brought an action in the Eastern District of New York, making claims similar to those asserted in *Hurley* v. *Van Lare,* and seeking similar relief, except that they did not contest the validity of 18 N.Y.C.R.R. § 352.31(a)(3)(iv). Defendant Shuart is Commissioner of the Department of Social Services of Nassau County. The district court granted the plaintiff's motion for summary judgment, and gave the declaratory and injunctive relief sought, adopting the *Hurley* district court's "reasoning on class action status, jurisdiction, inconsistency of the state regulation and injunctive relief. . . ." It denied retroactive AFDC payments.

Lavine and Shuart appeal from the summary judgment.

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[3] The eviction order was nullified when Taylor paid her overdue rent out of the proceeds of her April 1973 grant, a grant increased to the pre-January 1, 1973, level because of the fact that her sister began to receive aid under the joint federal-State Aid to the Disabled Program on March 14, 1973. On the basis of the limited record before us we do not decide whether Taylor's claim for declaratory and injunctive relief is moot. On remand, the district court should consider whether her claim presents a justiciable controversy. See *Hall* v. *Beals,* 396 U.S. 45, 48 (1969); *Golden* v. *Zwickler,* 394 U.S. 103, 108 (1969).

II.

Without passing on the constitutional claims, we agree they are sufficiently substantial to support jurisdiction under the liberal test the Supreme Court has recently announced in *Goosby* v. *Osser,* 409 U.S. 512 (1973). Where the constitutional claim is sufficient to vest the district court with jurisdiction, it is proper for a single judge to decide the statutory question under pendent jurisdiction, *Hagans* v. *Wyman,* —— U.S. ——, 42 U.S.L.W. 4381 (Mar. 25, 1974), and, if he sustains it, to defer requesting a three-judge court under 28 U.S.C. § 2281, pending review.

Hurley, Taylor and Otey base their claim that the New York regulations are contrary to federal law on two Supreme Court decisions: *King* v. *Smith,* 392 U.S. 309 (1968), and *Lewis* v. *Martin,* 397 U.S. 552 (1970). On careful consideration of these cases, it is clear that neither justifies the district courts' interference with New York's program for distributing AFDC grants.

In *King* v. *Smith,* 392 U.S. 309 (1970), Alabama AFDC recipients brought an action to enjoin enforcement of a state regulation which provided that "an 'able-bodied man, married or single, is considered a substitute father of all the children of the applicant . . . mother' . . . if 'he lives in the home with the child's natural or adoptive mother for the purpose of cohabitation.'" 392 U.S. 313-14 (emphasis deleted). The effect of the regulation under Alabama law was to remove the family from the category of aid recipients created by section 406(a) of the Social Security Act: because of the presence of the "substitute father," Alabama presumed that there was no "continued absence . . . of a parent." 42 U.S.C. § 606(a) (1970). The Supreme Court held that the Alabama rule "defines 'parent' in a manner that is inconsistent with § 406(a) of the So-

cial Security Act." 392 U.S. at 333. Reasoning that the purpose of the federal AFDC program is to protect and benefit needy and dependent children, the Court said that "the only kind of 'parent,' under § 406(a), whose presence in the home would provide adequate economic protection for a dependent child is one who is legally obligated to support him." 392 U.S. at 332.

Alabama asserted that two state governmental interests were advanced by the substitute father rule: the state's interest in discouraging meretricious sexual relationships, and the state's interest in allocating its share of AFDC funds according to the needs of its citizens. As to the first interest, the Supreme Court allowed that states generally have broad discretion in regulating sexual behavior outside of marriage, but held after examining the legislative history of the Social Security Act that Congress did not intend section 406(a) to be a lever in the hands of state legislators to compel compliance with local standards of moral conduct. 392 U.S. at 320-27. As to the second interest, the Court granted that Alabama had the power to set the level of benefits and standard of need under its plan, but held that in determining need it must account for the actual resources of the child. 392 U.S. at 332.

In one sense, the *King* holding does not bear directly on the instant case. Unlike the Alabama substitute father regulation, the New York regulation does not presume to define "parent" artificially to deny eligibility to the family housing a lodger. The meaning of the term "parent" as is used in section 406(a) is therefore not directly at issue. The New York regulation merely determines the level of payment to the eligible family on the basis of the presence or absence of a lodger in the recipient household. This method of computing shelter allowance is permitted under the *King* v. *Smith* rationale if it is not designed

to vindicate a moral interest unrelated to the need of the family, and if it realistically determines the level of need. As to the first point, it is clear that there is not the punitive aspect to the New York regulation that there was in the Alabama substitute father regulation. This is not a case of New York trying to impose "middle class morality" on the welfare recipient, using AFDC as an instrument of social control. This fact is illustrated by the Otey and Taylor cases, cases in which the shelter allowances were reduced because of the presence of persons other than the mother's paramour in the recipient household. The appellees' claim that sections 352.30(d) and 352.31(a)(3)(iv) offend the principle in *King* v. *Smith* thus stands or falls on their assertion that the regulations create a conclusive presumption of lodger contribution to the AFDC unit's rental expense, and that this presumption does not account for the actual needs of the AFDC-eligible family.

Under the long-standing administrative interpretation of section 402(a)(7) of the Social Security Act, only real sources of income may be considered by the state in determining need. The most recent embodiment of that interpretation, section 233.90(a) of the Health, Education and Welfare regulations governing the content of state plans, clearly states that the presence of any individual except a person legally obliged to support the child "is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State." Any doubt remaining on the issue was removed by the Supreme Court's holding in *Lewis* v. *Martin*, 397 U.S. 552 (1970), that section 233.90(a) precluded California from attributing income to an AFDC-eligible child from a non-adopting stepfather who had no duty of support under state law.

Although we agree that federal law prohibits a conclusive presumption of support, we do not agree that the

New York regulations here in question imply such a presumption. The regulations imply only that the lodger's presence evidences the recipient family's diminished need for housing space. Section 352.30(d) does not attribute a non-existent obligation of support to the lodger, nor does it deny the AFDC-recipient children or caretaker their share of the actual housing expenditures. Prorating housing costs between the recipient and non-recipient simply reflects the separability of the need of the AFDC-eligible family members from the needs of persons who have not demonstrated their eligibility for public assistance. Indeed, if a section 352.20(d) lodger can separately demonstrate his eligibility for public aid, the AFDC shelter allowance is increased to include his share, a principle illustrated by the Taylor case. See note 3, supra.

Appellees have attempted to justify their position by incanting the words "conclusive presumption of contribution." But it is clear that the New York regulations are based on the fair inference from the presence of the lodger in the household that the AFDC-recipient family actually needs less space for its own use than it is paying rent for. Appellees do not dispute that in the event an eligible family chooses to live as lodgers in a portion of a non-eligible person's house, the state may pay only the eligible family's pro rata share of the total rent, regardless of contribution, without offending federal law; the recipient family would be due shelter allowance only for that portion of the house they were actually using. The outcome is no different when the AFDC family uses a portion of its own premises to house a non-eligible person, whether or not that person contributes to the rent.

Prorating housing expenses among recipients and non-recipients of public aid accounts for the economies of scale that are realized when individuals live in groups; per-

individual housing costs decrease as the number of individuals living together increases. In the Hurley case, for example, Hurley, her three children, and her lodger can live at a lower per capita housing cost than can Hurley and her children alone. Thus, the New York scheme does not attribute a false duty of support or a false source of income, but rather accounts for the actual cost of housing to an AFDC-recipient family.[4]

The New York regulations have a more limited objective than those held invalid in *King* and *Lewis*. The objective of section 352.30(d) is to insure that all of the beneficiaries of an AFDC grant are entitled to enjoy it. Unlike the Alabama and California regulations, the New York regulations do not cut off all aid to families having non-eligible persons in their households. They merely prevent non-eligible persons from benefiting from free living space.[5] New York's interest in preventing non-eligible persons from sharing in AFDC benefits is coextensive with

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[4] In preparing for these appeals, the New York Department of Social Services addressed a letter to the Regional Attorney of the Social and Rehabilitation Service of the Department of Health, Education & Welfare containing a request for an opinion on the following question:

> "Is a state policy of prorating a shelter allowance so as to reflect the percentage of public assistance recipients residing in a household valid under 45 CFR 233.90?"

The response of the Regional Commissioner of the Department was available a short time after these appeals were argued:

> ". . . HEW has permitted states to prorate shelter allowances to reflect the percentage of public assistance recipients in a household. Such a proration is not considered an assumption of income, but rather a recognition that per-individual costs decrease as the number of individuals living together increases."

[5] In *Battle* v. *Lavine*, —— App. Div. —— (2d Dep't April 22, 1974), the Appellate Division held that the regulation pro-

(footnote continued on following page)

the federal interest in allocating AFDC appropriations only to eligible persons. Section 402(a)(10) of the Social Security Act, 42 U.S.C. § 602(a)(10) (1970), states that aid must be furnished "with reasonable promptness to all eligible individuals," language necessarily implying that aid should not be furnished to non-eligible individuals.

Reversed and remanded.

OAKES, *Circuit Judge* (dissenting):

The majority decision today reverses two distinguished federal trial judges and reaches a conclusion quite contrary to that of an Appellate Division of the New York Supreme Court, and antithetical to decisions of the Supreme Court of New Jersey, and of federal district courts in Massachusetts, Indiana and Georgia.[1] It also disregards the mandates of Supreme Court decisions from *King* v. *Smith*, 392

(*footnote continued from preceding page*)

rating shelter allowance violated 45 C.F.R. § 233.90. Solely on the authority of the district court's decision in *Hurley* v. *Van Lare*, it rejected the proposition that the purpose of the New York regulation is to prevent non-eligible persons from benefiting from shelter allowance payments. Since we reverse *Hurley* v. *Van Lare*, we do not give any weight to the Appellate Division's holding.

[1] *Battle* v. *Lavine*, —— App. Div. ——, —— N.Y.S. 2d —— (2d Dep't Apr. 22, 1974). *Contrary to the majority's suggestion*, at note 5, the New York court's decision was not merely based *on the authority* of *Hurdey* v. *Van Lare*. One would be surprised were a high court of the soverign state of New York to determine *the purpose of a state regulation* "[s]olely on the authority of [a federal] court's decision." Majority opinion at note 5. Rather *Hurley* v. *Van Lare* was simply cited for the proposition that the federal district court had reached one of the same conclusions as the Appellate Division—that "notwithstanding the [State's] protestations

(*footnote continued on following page*)

U.S. 309 (1968), to *Shea* v. *Vialpando*, 42 U.S.L.W. 4559 (U.S. Apr. 23, 1974). As such, today's majority opinion stands nakedly—and thankfully—alone, for the majority permits a state to deprive the dependent children of a needy family of a portion of their allowances for shelter because some person—whether an unemployed adult child, a disabled (but ineligible) sister, or a male "friend"—resides in the same household. The result I think flies in the teeth of the federal law and Supreme Court decisions, disregards economic realities and is quite unjust to the needy children otherwise entitled to assistance.

The majority today finds two challenged New York regulations in conformity with the federal statute, 42 U.S.C. § 602(a)(7),[1a] and regulation, 45 C.F.R. § 233.90(a)

(*footnote continued from preceding page*)

that their concern is that ineligibles not receive a rental stipend, the inevitable result of the State regulation under attack is to reduce, perhaps drastically, the stipend for those who are eligible." —— App. Div. ——, —— N.Y.S.2d at ——. Other shelter allowance cases contrary to the majority decision include *Hausman* v. *Department of Institutions and Agencies*, 64 N.J. 203, 314 A.2d 362 (1974). *See also Mothers and Childrens Rights Organization, Inc.* v. *Stanton*, 371 F. Supp. 298 (N.D. Ind. 1973); *Owens* v. *Parham*, 350 F. Supp. 598 (N.D. Ga. 1972) (three-judge court); *Boucher* v. *Minter*, 349 F. Supp. 1240 (D. Mass. 1972) (three-judge court), all of which are unmentioned by the majority opinion.

[1a] 42 U.S.C. § 602 reads, in pertinent part:

(a) A State plan for aid and services to needy families with children must . . .

(7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same house as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income.

(1973).[2] The first challenged regulation, 18 NYCRR § 352.31(a)(3)(iv),[3] is New York's administrative soft shoe around *King* v. *Smith, supra.* New York defines a man who lives with a woman to whom he is not married

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[2] 45 C.F.R. § 233.90 Factors specific to AFDC.

(a) *State plan requirement.* A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extend [sic] that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

[3] 18 NYCRR § 352.31(a) . . .

(3) When a female applicant or recipient is living with a man to whom she is not married, other than on an occasional or transient basis, his available income and resources shall be applied in accordance with the following:

. . . (iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(d).

and for whom he does not assume financial responsibility as a "lodger." In *King,* Alabama had defined a man who engaged in the same conduct a "parent." In *King* the result of that definition was to disqualify the AFDC *child* from receiving any benefits; in the present case the result of New York's definition of the man as a "lodger" is also to disqualify the AFDC child, although only from a portion of his benefits. Thus by New York's cleverness in changing a "parent" to a "lodger," it has managed, with the aid of today's decision, to accomplish what a number of other states have not—the reduction in the AFDC's child's benefits on the basis of the mother's living arrangements. *See, e.g., Lewis* v. *Martin,* 397 U.S. 552 (1970); *King* v. *Smith, supra; Rosen* v. *Hursh,* 364 F.2d 731 (8th Cir. 1972); *Reyna* v. *Vowell,* 470 F.2d 494 (5th Cir. 1972); *Boucher* v. *Minter,* 349 F. Supp. 1240 (D. Mass. 1972) (three-judge court); *Owens* v. *Parham,* 350 F. Supp. 598 (N.D. Ga. 1972) (three-judge court); *Gaither* v. *Sterrett,* 346 F. Supp. 1095 (N.D. Ind.) (three-judge court), *aff'd,* 409 U.S. 1070 (1972). At least one state has been frustrated twice, *see X* v. *McCorkle,* 333 F. Supp. 1109 (D.N.J. 1970), *aff'd sub nom. Engleman* v. *Amos,* 404 U.S. 23 (1971); *Hausman* v. *Department of Institutions and Agencies,* 64 N.J. 203, 314 A.2d 362 (1974). And, interestingly, the majority, by not striking down this regulation, runs directly counter to its *own* assessment of what *King* stands for—"that Congress did not intend [AFDC] to be a lever in the hands of state legislators to compel compliance with local standards of moral conduct."

This determination may not be so harsh as it sounds, however, for it seems plain enough that the three-judge court should find this regulation unconstitutional. The definition of a "lodger" as a man who lives with a woman to whom he is not married, while not defining a woman who

lives with a man as such, is so patently a violation of equal protection on the basis of sex, *see Frontiero* v. *Richardson,* 411 U.S. 677 (1973); *Reed* v. *Reed,* 404 U.S. 71 (1971), that, whether sex is regarded as a "suspect" classification or not, the State is unlikely to be able to find a justification for the classification here.

The other regulation under challenge here, 18 NYCRR § 352.30(d),[4] is more significant—both because its cleverness makes it more insidious and because, even absent the other regulation defining "lodger," this regulation also permits the reduction of recipient children's benefits as a result of whom the mother allows to live in the house, the apartment or tenement as the case may be. This regulation provides that if a lodger pays $15 a month or more, that amount will be considered income to the recipient family.[5] If, however, the lodger pays nothing, or less than $15, then a pro rata share of the shelter allowance, including fuel for heating, will be deducted from the *family's*

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[4] 18 NYCRR § 352.30(d):

> A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance.

[5] This actual contribution, like all other income, will result in a reduction of the family's benefits under the theory that welfare will only provide that money necessary to bring a family up to its level of need. This section of the regulation is unchallenged and, in my view, comports entirely with the intent of the federal statute and regulations.

benefits.[6] This is the regulation which resulted in plaintiff Taylor and her six-year-old child receiving an eviction notice because a reduced shelter allowance made it impossible to meet the rent. Plaintiff Taylor's "lodger"? Her disabled sister. This is the regulation which requires plaintiff Otey to throw her unemployed, ineligible-for-welfare, 23-year old son out on the street, because if he lives in the home their shelter allowance will not be sufficient to pay the rent, while if he moves out the State will pay the full amount.[7]

The majority concedes that if this regulation *conclusively presumed* the availability of income from the lodger and reduced the AFDC child's benefits on that basis, then the regulation would be unlawful under the HEW regulation. Rather than find such a presumption inherent in the regulation, however, the majority advances two independent

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[6] Those on welfare are sure to learn quickly that they will maximize their benefits by *claiming* that they receive $15 a month from their lodger, resulting in only a $15 diminution of their shelter allowance. In this way they will lose only $15 of benefits, rather than a pro rata share, which normally would be more. Thus, in Hurley's case the pro rata reduction was $30, although she received no contribution from her male friend. In Taylor's case the pro rata reduction was $55, although she received no contribution from her sister. In Otey's case the pro rata reduction was $48.35 although she received no contribution from her son. One may wonder about the rationality of a system which deducts $55 from someone receiving no contribution, but only $15 from someone receiving a $15 contribution.

[7] Compare this result with the federal purpose "to help maintain and strengthen family life," 42 U.S.C. § 601, and the federal requirement that states provide services "for the purpose of preserving . . . the family. . . ." 42 U.S.C. §§ 602(a)(13), 602(a)(14), 606(d). *See Shea* v. *Vialpando,* 42 U.S.L.W. 4559, 4560 (U.S. Apr. 23, 1974). *See also Rodriquez* v. *Vowell,* 472 F.2d 622, 626 (5th Cir.), *cert. denied,* 412 U.S. 944 (1973).

bases or objectives of the regulation as compatible with the federal law and regulation. Each of them is in my view wholly lacking in sufficiency.

The first allowance "basis" for the regulation found by the majority is "the fair inference from the presence of the lodger in the household that the AFDC-recipient family actually needs less space for its own use than it is paying rent for." While "it is clear" to the majority that this inference is the basis of the regulation, this was not the basis claimed by the State either in the court below or in this court.[8] Rather this "basis" for the regluation lies in my colleagues' fertile imagination. If this case were here now upon an equal protection challenge, then the majority might properly try to find a reasonable basis for the classification. *Dandridge* v. *Williams,* 397 U.S. 471 (1970). But this is not an equal protection challenge. It is a challenge under a federal statute and regulation which through several years and many cases of judicial scrutiny have taken on substantive requirements well beyond those of the Equal Protection Clause. Primary among those requirements is that *a child's resources are to be measured in actuality, not on the basis of a presumption. See, e.g., Shea* v. *Vialpando,* 42 U.S.L.W. 4559, 4562 (U.S. Apr. 23, 1974). The majority acknowledges the federal prohibition of a presumption of support. Support, however, is just one type of resource affecting a family's need; the amount of available living space is another. Yet in place of a presumption of support, the majority substitutes a *conclusive presumption that*

[8] It would indeed be hard to maintain that this is the basis for the rule, because as soon as the "lodger" moves out, the full shelter allowance is restored. If the presence of the lodger demonstrated excess space, as maintained by the majority, then his moving out would not be a reason to resume full shelter payments.

whenever there is a "lodger" the family has more space than it needs. As such, it may well be contrary to fact: the older brother may be sharing a single bed with a younger one; the disabled sister may be sleeping on the couch.

Labeling the New York regulation a "fair inference" does not change its conclusive nature where a showing contrary to the inference will not affect the shelter allowance reduction; here the only fact considered by the State in the fair hearing is the presence or absence of a lodger, not the amount of space in the apartment. If the regulation provided only for a rebuttable presumption, whether of payments by the lodger or of excess space, there might well be a different question.[9] Thus, the majority, in upholding the regulation on this basis, creates a conclusive presumption regarding the child's needs which has the effect of reducing the AFDC child's benefits. This directly contravenes

[9] In *Mothers and Childrens Rights Organizations, Inc.* v. *Stanton,* —— F. Supp. ——, Civ. No. 72 F 69 (N.D. Ind. 1973), the court found regulations almost identical to New York State's in conflict with the federal law and regulations *as applied.* The court found that making a presumption of support, if rebuttable, was lawful, but if the presumption was irrebuttable in practice, then it was unlawful. *Accord, Hausman* v. *Department of Institutions and Agencies,* 64 N.J. 203, 314 A.2d 362 (1974). In *Owens* v. *Parham,* 350 F. Supp. 598 (N.D. Ga. 1972) (three-judge court), the court also found a presumption in analytically identical regulations upheld the regulations on their face, but found them *unconstitutional* as applied, because recipients whose shelter allowances were reduced as a result of non-eligibles residing in the household were not given an opportunity to rebut the presumption. The Supreme Court in *Shea* v. *Vialpando,* 42 U.S.L.W. at 4564, suggested a similar solution in finding a uniform allowance for work-related expenses unlawful under the Act. The Court said that if there were provided an opportunity for individualized consideration where the allowance was not sufficient, then the allowance would not be unlawful.

the HEW regulation which provides:

> [A state plan must] [p]rovide that the determination of need and the amount of assistance for all applicants and recipients will be made on an *objective and equitable basis*. . . .

45 C.F.R. § 233.20(a)(1) (emphasis added). The majority's conclusive presumption of the child's need, or lack of it, also violates what seems to me the clear import of *Shea* v. *Vialpando, supra; King* v. *Smith, supra; Lewis* v. *Martin, supra;* and HEW regulation, 45 C.F.R. § 233.90(a), that a family's resources (be they income or amount of living space) be determined by what it *actually* has or receives, not by presumptions or inferences.[10] If such a presumption be the basis for the New York regulation,[11]

[10] In *Shea* v. *Vialpando, supra,* the Court declared a Colorado uniform allowance for work-related expenses incompatible with the Social Security Act, saying:

> From the inception of the Act, Congress has sought to ensure that AFDC assistance is provided only to needy families, and that the amount of assistance actually paid is based on the amount needed in the *individual* case after other income and resources are considered.

42 U.S.L.W. at 4562 (emphasis original).

[11] New York's regulations requiring initial and continuing investigations into need and eligibility demonstrate both its general adherence to *the rule of determining actual, individual needs and resources* and the lack of necessity for a presumption regarding excess living space. The New York regulations deal in some detail with the investigations to be made both initially, 18 NYCRR §§ 351.1-.6, and on a continuing basis, 18 NYCRR §§ 351.20-.21. The *actual* resources are investigated in depth. 18 NYCRR § 351.2(e). Among the facts to be determined by documents, personal observation, personal and collateral interviews and other means are

(footnote continued on following page)

it is in violation of federal law, and the regulation must fall.[12]

An "objective" of the New York regulation, according to the majority, "is to insure that all of the beneficiaries of an AFDC grant are entitled to enjoy it." Clearly the State is not required, or for that matter allowed, to extend AFDC benefits to ineligible persons. The question, however, is whether this regulation serves to keep AFDC benefits from the ineligible, or whether instead it unlawfully withholds benefits from those rightfully entitled to it—dependent children in need and their responsible families. The fallacy underlying the majority's view, and the argument of the State on this issue, is that the lodger is not a "beneficiary" of the AFDC grant either in law or fact. The lodger is rather the beneficiary of the AFDC family's generosity, and more likely that of the AFDC children's mother. If a lodger is not present in the house-

(*footnote continued from preceding page*)

> the residence and family composition. Each member of the household is investigated as to age, relationship to other members, marital status, employment, and the like. 18 NYCRR § 351.2(c). The place of residence must itself be specifically investigated and approved. 18 NYCRR § 351.3. Every six months all variable factors of need must be reconsidered, re-evaluated, and verified. 18 NYCRR § 351.21 (b)(2). In short, it is absurd to create an administrative presumption concerning resources of income or space, when the actual information is on file and subject to immediate verification. Let it be remembered that New York justified its "home visits" in *Wyman* v. *James,* 400 U.S. 309 (1971), by its claimed need to gather this very type of information.

[12] This conclusive presumption, which the majority styles a fair inference, is in any case in violation of due process. *See Owens* v. *Parham, supra. See also United States Department of Agriculture* v. *Murry,* 413 U.S. 508 (1973); *Vlandis* v. *Kline,* 412 U.S. 441 (1973); *Stanley* v. *Illinois,* 405 U.S. 645 (1972); *Heiner* v. *Donnan,* 285 U.S. 312 (1932).

hold, the family receives a rent allowance determined by the State to be proper for the family. If a lodger then is invited into the household, he would not receive any benefit from the AFDC grant, the entire amount of which the family is entitled to without him; he is rather a recipient of that charity which the family wishes to extend *from its own resources.*[13] He is there at the family's forbearance

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[13] To carry out the majority's analysis, when the welfare mother puts a dollar bill in the collection plate on Sunday, the church is "sharing in AFDC benefits," and presumably the majority would uphold a state regulation which provided for withholding from the AFDC grant a sum equal to any donations to charity. The supposed justification remains the same—the State provides AFDC grants for the support of the dependent child and not for the benefit of ineligibles, and the fallacy is the same. Rather the State provides the family with what it determines to be the necessary resources, but then the resources belong to the family to utilize as it best sees fit. Absent this element of choice a welfare state would be a police state.

If the State believes that the resources are being misused to the detriment of the child, it has a vast battery of provisions which it may use to protect the child. Initially and primarily there are counseling services for the family. 18 NYCRR §§ 386.1-.10. This may range from simple caseworker counseling to specialized psychiatric help. Where a recipient has demonstrated an inability to handle the cash resources provided, restricted payments may be made rather than the normal unrestricted payments. Soc. Services Law § 350-a; 18 NYCRR § 381.3(a). For instance, if the head of the household wastes money so that rent payments cannot be met, the State may undertake to pay the shelter allowance directly to the landlord. Soc. Services Law § 143-b; 18 NYCRR § 381.3(c). The overall payments may be made to a person other than the head of household or to an agency on behalf of the eligible child. 18 NYCRR § 381.8. A homemaker may be provided in the house for the family. 18 NYCRR § 387.2. Intensive family casework services are available. 18 NYCRR §§ 456.1-.7. In extreme cases the

(footnote continued on following page)

or pleasure and he has no right to remain. He receives nothing from the State, and when the family's shelter allowance is reduced, nothing is taken from him. He continues to live in the household at the pleasure of the family.

Clearly what the State is doing is not keeping welfare funds from the ineligible by this regulation.[14] Rather it seeks to punish the welfare family for using its own resources in a manner of which the Commissioner disapproves in advance in every case. Whether the Commissioner is attempting to enforce the "middle class morality" mentioned by the majority, or just trying to save money any way he can, the federal statute and regulations, and the unanimous case law forbid the State from enforcing its predilections *which are irrelevant to the welfare of the child*[15] by depriving the eligible child of its needs. *See, e.g., Carleson* v. *Remillard,* 406 U.S. 598 (1972); *Townsend* v. *Swank,* 404 U.S. 282 (1971); *Lewis* v. *Martin, supra; King* v. *Smith, supra; Doe* v. *Ellis,* 350 F. Supp. 375 (D.S.C. 1972) (three-judge court); *Saddler* v. *Winstead,* 332 F. Supp. 130 (N.D. Miss. 1971); *Doe* v. *Schmidt,*

(footnote continued from preceding page)

children may be removed from the home and placed in foster care. Soc. Services Law § 358-a; 18 NYCRR § 450.3. And, of course, the whole gamut of procedures relating to neglected children is available to the State. Soc. Services Law §§ 374, 397, 398; Penal Law §§ 260.05, .10; Family Court Act § 1011-74.

[14] If the lodger were receiving welfare funds for which he was ineligible, he could be prosecuted for welfare fraud. Soc. Services Law § 145.

[15] Neither the State nor the majority has asserted that the regulation in question in any way safeguards the welfare of the eligible child. Nor does it appear how by reducing the child's benefits, which in one of the cases before us resulted in a notice of eviction, the child's welfare would be enhanced.

330 F. Supp. 159 (E.D. Wis. 1971) (three-judge court); *Doe* v. *Shapiro,* 302 F. Supp. 761 (D. Conn. 1969) (three-judge court), *appeal dismissed,* 396 U.S. 488 (1970). And that is exactly what is being done here.

To repeat, to reduce the shelter allowance of an AFDC family by virtue of the presence in the home of a non-paying lodger does not deprive the lodger of any benefits —only the family which allows him to stay can do that— but rather deprives the needy family, and especially the needy child who is the object of the AFDC program, of them.

If the State believes that the non-paying lodger should not get a "free ride," the State may legislate or proceed against the lodger, but should it be permitted to deprive *the needy child?* The State may attempt to obtain reimbursement from the lodger for the use of the family's resources,[16] but should it be able to punish the child because the head-of-household does not require the lodger to pay for his shelter? *Cf. Doe* v. *Schmidt, supra; Doe* v. *Shapiro, supra.*

There are only two other points made by the majority requiring passing mention. First, there is a suggestion that an "economy of scale" operates in the sense that the per capita housing cost decreases when there is a lodger. It is nonsense, however, to say that the cost of housing to the recipient family decreases when there is a *non-paying* lodger. Moreover, an economy of scale does not reduce the *total* cost of anything, and yet here, where the recipient family is legally and factually responsible for the total rent bill, the State is providing a *smaller* total allowance

[16] The State already requires the applicant for welfare to assign certain assets and to utilize all resources for the production of income. *See* 18 NYCRR §§ 352.15(d), 352.23, 352.25, 352.27, 352.28.

although the lodger contributes nothing. An economy of scale would operate only if the lodger were presumed to pay his pro rata share. But such a presumption would be clearly unlawful, as the majority concedes and 45 C.F.R. § 233.90(a) provides. The presence of a lodger is, finally, irrelevant to the rent the family pays. A certain rent is due and payable; if the State reduces the rent allowance, the difference will either be made up out of food budget— literally out of the needy child's mouth—or it will not be made up, resulting in a notice of eviction. Plaintiff Taylor with her eviction notice would surely laugh, although perhaps a little bitterly, at the majority's suggestion that by housing her destitute and disabled sister the family's "actual cost of housing" was reduced.

Finally, in a footnote, the majority quotes from a letter from HEW in response to questions from the State. The suggestion of the footnote is that HEW has taken a position on the question before us. To the contrary, however, in that same letter HEW acknowledged that it approves both plans like New York's and those which grant full shelter allowance despite the presence of non-recipients in the household. In other words, HEW here, just as it did prior to *King* v. *Smith, supra,* has not resisted a state's attempt to evade its own regulations and the federal statutes. *See also Shea* v. *Vialpando,* 42 U.S.L.W. at 4563 n. 11.

I would affirm the judgments below, because, as Judge Bauman said,

> the inevitable result of these regulations is to reduce, perhaps drastically, the stipend for those who are eligible. . . . This devastating reduction means in practice that rental payments must be met out of that portion of the welfare stipend allotted for food and clothing.

Hurley v. *Van Lare*, 365 F. Supp. 186, 195 (S.D.N.Y. 1973). Because the regulation denies the eligible child his basic needs for no reason related to the purpose of the federal statute, it violates that statute and the implementing regulations.[17]

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[17] The majority's decision in its own words is premised upon what the majority concludes the *New York regulations* to "imply" or to be "based on," or their "objective." The Appellate Division in *Battle* v. *Lavine, supra*, the highest state court to have spoken on the issue, has explicitly rejected the interpretation of the majority here. Whether this court should be bound by the interpretation of state law made by *Battle* is a question not argued or briefed to us as *Battle* was decided after argument before this court. Nevertheless, it is clear that the majority decision, based as it is on an interpretation of state law, does not preclude New York courts from reaching an opposite conclusion, as the *Battle* court did, as to the conformity of the state regulations with the federal statute and regulations.

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 18th day of June, one thuosand nine hundred and seventy-four.

Docket Nos. 73-2671
73-2731

ANNIE TAYLOR, et al.,

Plaintiffs-Appellees,

v.

ABE LAVINE, et al.,

Defendants-Appellants.

ROSE HURLEY, et al.,

Plaintiffs-Appellees,

v.

BARRY VAN LARE, et al.,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheared in banc having been filed herein by counsel for the plaintiffs-appellees, and a poll of the judges

Order Denying Petition for Rehearing.

in regular active service having been taken and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied. Judges Feinberg and Oakes dissent.

IRVING R. KAUFMAN
Chief Judge
IRVING R. KAUFMAN

PROCEEDINGS BEFORE THE THREE-JUDGE COURT FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK IN *HURLEY* v. *VAN LARE*, 73 CIV. 3423, AND *TAYLOR* v. *LAVINE*, 73 CIV. 699, ON REMAND FROM THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

Additional Regulatory History of 18 NYCRR §§ 352.30(d), 352.31(a)(3)(iv) and Related Regulations Submitted in Response to Notice to Produce Directed to State Defendants.

Bulletin No. 134d page No. 35

July 2, 1965

Section 353.3

(c) *For nonlegally responsible relatives*

(1) When a self-maintaining non-legally responsible relative is a member of the household and when he is willing to have his income verified and applied, his needs and those of his spouse and minor children shall be estimated in accordance with the MILS established by the department. He should be asked to contribute 50 per cent of the surplus income to the support of the applicant or recipient. [See Appendix C.]

(2) When, however, the relative will not contribute to that extent, or is unwilling to have his income verified, and when the applicant or recipient lives in the home of the relative and when, in the opinion of the agency, the home should be preserved for him, the agency may meet those needs which the relative is unwilling to meet. Ordinarily only those items which entail additional expense to the relative should be included. However, if essential to the maintenance of the home for the recipient, prorated shelter costs or a board and room rate may be allowed. The boarding rate may include payment for exceptional personal services if they cannot otherwise be provided.

(3) When the relative will not contribute to the extent indicated in paragraph (1) above, and when the relative lives in the home of the re-

cipient, he should be expected to at least pay to the recipient a commercial rate of room and board. This policy applies also to a friend living with a recipient.

(4) A nondependent relative receiving an ADC grant for a dependent child or minor shall be budgeted according to paragraphs (1) and (2) above, except that such grant may not be paid on a board and room basis but must be based on verified shelter items and agency schedules.

Bulletin No. 134d page No. 31

December 17, 1965

Section 353.1 The budgetary method

(a) The budgetary method shall mean the balancing of available resources against the estimate of regularly recurring need, in order to determine the existence of a budget deficit. When the estimate of regularly recurring need exceeds the available resources, the difference shall be known as a budget deficit. When the available resources exceed the estimate of regularly recurring need, the difference shall be known as a budget surplus.

(b) The budgetary method shall be applied to the individual case to determine eligibility and the amount of the grant.

(c) An individual or family shall be deemed "in need" when a budget deficit exists or when the budget surplus is inadequate to meet one or more non-budgeted special needs required by the case circumstances and included in the standards of assistance.

(d) In establishing the budget on which determination of need is based, all items of basic maintenance and all

items of special need required by case circumstances shall be included.

(1) Where investigation has been completed and need established on a continuing basis, the recurring cash grant shall be the full budget deficit, or it shall be the full budget deficit less the amounts which are to be met by special grants.

[*Comment:* Carrying charges on property may be met by special grants at the time taxes, interest on mortgage, water rent and fire insurance become due and payable.]

(2) In cases where need is deemed to be temporary, (less than three months) as in many HR cases, the grant shall be limited to those basic maintenance and/or special items for which there is immediate need.

(e) Special grants shall be made to meet: non-budgeted special needs included in the standards of assistance; emergency needs prior to completion of investigation of initial eligibility; and to supplement the regular grant because of unanticipated increase in need or decrease in income.

(f) For those items for which the allowance is based on age, the attained age at the time of the effective date of opening, reopening, reauthorization or change in grant shall be used.

page 32

Section 353.2 Persons included in the budget

(a) For budgetary purposes the agency shall include in its estimate of need and application of income all persons applying for or receiving public assistance

and care and living as a unit within the same household.

(b) Self-maintaining legally responsible relatives in the household, including a minor child of an applicant or recipient, shall not be included in the budget, but shall have their ability to contribute determined in accordance with pertinent regulations.

(c) A lodger or boarder shall not be included in the budget. However, allowance shall be made for those items of expense incurred by reason of his presence in the household including $38 for his food. The amount paid by such boarder shall be applied as income to the household.

[*Comment:* (1) The spouse and the parent of a minor child for whom public assistance is requested or received shall be budgeted in accordance with section 353.3 (a) below.

(2) A self-maintaining minor between the ages of 16 and 21 living with his parent or parents who are receiving ADC or HR shall be budgeted in accordance with section 353.3 (b) (5).

(3) Ability of other self-maintaining members of the household to contribute shall be determined in accordance with section 353.3(c).

(4) For budgeting a child boarded in a public assistance household, see section 352.7 (b) (1)(ii)(*b*)]

Section 353.3 Estimate of need and application of income

(a) *For applicant or recipient*

(1) The estimate of need for any applicant or recipient shall include all items of basic maintenance and items of regularly recurring special need specified in Section 352.5 of these regulations for persons in the circumstances under which such items are allowed. The amount to be included for each item of basic maintenance and for each item of special need shall be the appropriate amount provided in the allowance schedule for such item. However, the schedule allowance for items of basic maintenance or special need may, if insufficient, be adjusted when the individual circumstances are such as to require some modification of the scheduled amount and these circumstances have been verified and recorded. To the extent that an item of basic maintenance or special need is otherwise provided, it shall not be included in the estimate of need, but the manner in which such item is provided shall be recorded.

page No. 32

[*Note:* See Section 352.7—Utilization of Resources —subdivisions (b) (1) (ii) (*d*), (*e*) (*f*) and (*g*)]

(2) All income possessed by an applicant or recipient, who is living with a relative other than a spouse or minor child, shall ordinarily be applied first against his own needs, with any balance applied against the needs of those for whom he is legally responsible. On an exceptions basis income possessed by such an applicant or recipient may be pro-rated against the needs of

another related member of the household. [See subdivisions (b) and and (c) of this section below.]

(3) When a person who is possessed of income is not applying for public assistance or care for himself, but when he is living with a spouse or a minor child for whom public assistance or care is requested, the needs of such person shall be estimated as if he were applying for public assistance and his income shall be similarly applied. This policy shall ordinarly be applied even though there is no legal marriage, if the adults are generally regarded as man and wife.

(b) *For legally responsible relatives*

(1) When a self-maintaining legally responsible relative, other than the spouse or the parent of a minor [up to 21 years] for whom public assistance is requested or received, is in the same household with an applicant or recipient, his ability to support shall be determined by deducting from his gross income his needs and those of his spouse and minor children, estimated in accordance with the moderate income level standard established by the department. [See Appendix B] In considering the availability of other resources of the relative for support, allowance may be made for maintaining reserves sufficient to meet anticipated needs. The surplus of income over needs shall be deemed available for support except that when it is verified that the relative is currently meeting exceptional, essential needs not included, or not

adequately included in the moderate income level standard, an allowance may be made for such needs. The self-maintaining members of the household shall ordinarily be budgeted as a unit in applying the MILS, with any necessary adjustment for more than one earner and with income tax allowed as verified.

(2) When the relative lives in the home of the applicant or recipient he shall be expected to pay to the recipient his share of shared items plus food if he eats his meals at home. His surplus income, as computed in paragraph (1) above shall be deducted from the estimated needs of the applicant or recipient.

(3) When the legally responsible relative of an applicant or recipient who has been found able to support fails to do so, an emergency grant shall be made to meet urgent needs pending action to enforce support.

(4) When the self-maintaining spouse of a recipient, or the parent of a minor receiving public assistance, resides outside the household, his needs and those of his dependents who reside with him shall ordinarily be estimated in accordance with public assistance standards described in subdivision (a) above, plus an adjustment allowance of 25 percent of the combined needs of his household.

(5) Except for youths employed under Titles I or II of the Federal Economic Opportunity Act, a self-maintaining minor between the ages of 16 and 21 living with one or both parents receiving

ADC or HR shall have his needs estimated in accordance with public assistance standards. If such minor refuses to have his income verified and/or his surplus income applied against the needs of his parent or parents he shall be removed from the case count. The budget deficit of the recipient shall be reduced by an amount equal to such minor's share of maintenance and his personal need. His obligation to contribute support for his parents shall be determined by applying the MILS.

(6) When a self-maintaining legally responsible relative, other than the spouse or parent of a minor, lives outside the household of the applicant or recipient, his ability to support the applicant or recipient shall be determined by application of the MILS standard established by the department. Fifty percent of the surplus income shall be considered available for support except if modification is deemed appropriate.

(c) *For non-legally responsible relatives*

(1) When a self-maintaining non-legally responsible relative is a member of the household and when he is willing to have his income verified and applied, his needs and those of his spouse and minor children shall be estimated in accordance with the MILS established by the department. He should be asked to contribute 50 per cent of the surplus income to the support of the applicant or recipient. [See Appendix B.]

(2) When, however, such relative is unwilling to contribute to the extent indicated above, or is

unwilling to have his income verified, and when the applicant or recipient lives in the home of such relative, the agency may meet those needs which the relative is unwilling to meet. Ordinarily only those items which entail additional expense to the relative should be included. However, if essential to the maintenance of the home for the recipient, prorated shelter or a board and room rate may be allowed. The boarding rate may include payment for exceptional personal services if they cannot otherwise be provided.

page No. 35

(3) When such relative is unwilling to contribute to the extent indicated in paragraph (1), and when the relative lives in the home of the recipient, the budget deficit of the recipient shall be reduced by an amount equal to the difference between the prevailing commercial rate for room and board and the cost attributable to his living in the home. The provisions of this paragraph shall apply also to a friend living with the recipient.

(d) *For combined household, legally and non-legally responsible relatives*

(1) When a household consists of persons receiving asistance and a self-maintaining group which includes both legally and non-legally responsible relatives, and when the income is possessed solely by the legally responsible relative, the ability to support shall be determined as in subdivision (b) of this section above. When the income is possessed in whole or in part by the non-

legally responsible relative, the needs and income shall be budgeted as in subdivision (c) of this section above.

(2) When a household consists of dependent persons and a self-maintaining person who is legally responsible for part but not all of the dependent persons, his ability to support those for whom he is legally liable shall be determined in accordance with subdivision (b) of this section above.

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Bulletin No. 134 page No. 39

June 5, 1969

(b) A non-legally responsible relative in the household who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. A lodger or boarding lodger shall not be included in the budget. The amount of room and board which he pays shall be verified and that which is in excess of $55 a month shall be considered as income to the family. The amount paid by a lodger shall be verified and that which is in excess of $12 a month shall be considered as income to the family.

[NOTE: Rent, as paid, is budgeted for the assistance group, even though in excess of shelter schedule allowance, when lodging is furnished as in (a) or (b) above. Income received will, in effect, reduce shelter costs for assistance group by application of net income.]

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Bulletin No. 134 page No. I-3

June 1, 1970

(c) A non-legally responsible relative in the household who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15.00 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income.

[NOTE: Rent, as paid, is budgeted for the assistance group, even though in excess of shelter schedule allowance, when lodging is furnished as in subdivision (a) or (c) above. Income received will, in effect, reduce shelter costs for assistance group by application of net income.]

Interrogatories to Defendant Lavine.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ROSE HURLEY, individually and on behalf of her minor dependent children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Plaintiffs,

against

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York,

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York,

LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Defendants.

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72 Civ. 3423

(A.B.)

To: HONORABLE LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Two World Trade Center
New York, New York 10047
Att: Judith Gordon, Esq.

GERALD HARRIS, Esq.
County Attorney
County Office Building
White Plains, New York 10601

Interrogatories to Defendant Lavine.

The plaintiffs in the above entitled action request that defendant Lavine answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

1. The exact or approximate number of persons and families in New York State who have had their grants of public assistance terminated, reduced, or suspended because of the operation and enforcement of 18 NYCRR §§ 352.30(d) and 352.31(a)(3) in (a) 1971, (b) 1972, (c) 1973, and (d) 1974.

2. If the exact or approximate amount of the persons and families described in question one (1) are unknown and cannot be ascertained, state whether the amounts exceed (a) 500 (b) 1,000, (c) 5,000, (d) 10,000, (e) 25,000, (f) 50,000, (g) 100,000 persons and families for each of the years requested.

3. State the total number of persons and families in New York State who have had their grants of public assistance terminated, reduced, or suspended because of the operation and enforcement of 18 NYCRR §§ 353.30(d) and 352.31(a)(3) since the date of the promulgation of these regulations.

4. If the exact or approximate number of persons and families described in question three (3) are unknown and cannot be ascertained, state whether the amount exceeds (a) 1,000, (b) 5,000, (c) 10,000, (d) 25,000, (e) 50,000, or (f) 100,000 persons and families.

5. State the exact or approximate number of persons and families receiving public assistance who reside in the State of New York and who presently reside, or who at the last date for which this information can be ascertained re-

Interrogatories to Defendant Lavine.

sided, with a non-legally responsible person who is not receiving public assistance.

6. If the exact or approximate number of persons described in paragraph five (5) cannot be ascertained, state whether this amount exceeds (a) 1,000, (b) 5,000, (c) 10,000, (d) 25,000, (e) 50,000, or (f) 100,000 persons and families.

PLEASE TAKE NOTICE that a copy of the answers to the above interrogatories must be served upon the undersigned within 30 days after service of these interrogatories.

Dated: May 21, 1974, White Plains, New York.

MARTIN A. SCHWARTZ
THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY

By: Martin A. Schwartz
of Counsel
Attorneys for Plaintiffs

Defendant Lavine's Answers to the Interrogatories.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Patrick T. Kelly, Associate Commissioner of the New York State Department of Social Services, answers as follows to plaintiffs' interrogatories:

1. As an answer to Interrogatory No. 1: The New York State Department of Social Services keeps no records containing the number of reductions, terminations or suspensions of assistance made pursuant to 18 NYCRR 352.30(d) and 352.31(a)(3).

2. As an answer to Interrogatory No. 2: It is estimated that the total number of AFDC families residing in New York State who have had their grants of public assistance reduced pursuant to 18 NYCRR 352.30(d) is over 10,000 for each year listed. This estimate utilizes an assumption that one half of the AFDC families which are components of a household containing a non-PA recipient fall in the class of persons affected by 18 NYCRR 352.30(d) as opposed to 352.3(c). No effort was made to differentiate between those persons affected by 352.30(d) and 352.31 (a)(3), since, in terms of this lawsuit, such differentiation would be specious.

3. As a response to Interrogatory No. 3: See response to Interrogatory 1.

Defendant Lavine's Answers to the Interrogatories.

4. As a response to Interrogatory No. 4: The estimated total number of affected families is 25,000, subject to the qualifications stated in Response No. 2.

5. As a response to Interrogatory No. 5: There are approximately 26,900 AFDC cases in the state of New York in which there is a non-legally responsible person residing in the household who is not receiving public assistance. This Department has no records which would indicate the number of home relief cases involving recipients residing with non recipients.

6. As a response to Interrogatory No. 6: See response to Interrogatory No. 5.

(Sworn to by Patrick T. Kelly, Associate Commissioner for Income Maintenance, June 22, 1974.)

Order to Show Cause for Order Granting Intervention on Behalf of Francesca Aloise.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

ANNIE TAYLOR, et al.,

Plaintiffs,

against

ABE LAVINE, et al.,

Defendants,

FRANCESCA ALOISE, individually and on behalf of her minor son, MARIO ALOISE, and on behalf of all others similarly situated,

Proposed Intervenor-Plaintiff.

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73 Civ. 699

Upon the Affidavit of Francesca Aloise and her Proposed Intervenor's Complaint, it is

ORDERED, the defendants herein show cause before a three judge panel of this Court at a Term to be held at the United States Courthoue, Foley Square, New York, New York, Room , on the 26th day of June, 1974, at 10:30, or as soon thereafter as counsel can be heard why an order should not be made herein,

Granting the motion of proposed intervenor-plaintiff Francesca Aloise,

(a) Pursuant to Rules 23 and 24 (b) of the Federal Rules of Civil Procedure, to intervene in this action as a named party plaintiff.

SUFFICIENT CAUSE THEREFORE APPEARING, LET service of a copy of this order, together with the paper appended hereto, on all parties and each member of the three judge court before 5 P.M. the 24th day of June, 1974 be deemed sufficient.

/s/ JACK B. WEINSTEIN
United States District Judge

Dated: June 21, 1974
Brooklyn, New York

Affidavit of Francesca Aloise in Support of Order to Show Cause.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF KINGS } ss.:

FRANCESCA ALOISE, being duly sworn, deposes and says that:

1. I am a citizen of the United States and of the State of New York.

2. I live with my two sons at 1818—81st Street, Brooklyn, New York, Kings County, New York. The apartment in which we live has four rooms. I have one bedroom and my sons share the other bedroom.

3. I received public assistance for myself and two children until about February 1974. I am presently receiving

assistance for myself and my son, Mario. Our grant includes only two-thirds of the rental costs.

4. On or about November 12, 1973 the City Department sent me a Notice of Intent to Reduce my grant. The Notice stated: "We will reduce your budget as your son is working." The notice also gave a proposed budget which would keep my son, Carmine in my grant but would subtract all of his earnings, thereby requiring him to support myself and Mario. I requested a "fair hearing" to challenge the City's determination. After the "fair hearing" my grant was reduced; taking Carmine out of the budget and allowing only two-thirds of the rent.

5. Carmine was at that time, and is presently working as an apprentice to an electrician. He has told me that he does not intend to contribute any of his earnings for my support or for Mario's. He does not belief it is his duty and says he does not have enough money to do so.

6. The rent for our apartment is $165 per month until July 1, 1974 when it will be raised to $190 per month. The City Department is presently allowing us only two-thirds of the rent, and on information and belief they will allow us only two-thirds of the $190 rent as of July 1, 1974.

7. Since Carmine does not in fact contribute his share of the rent, I must take money from our food allowance in order to be able to pay the rent. This has caused a great deal of hardship to my younger son and myself. Since Carmine's share of the rent will be a greater amount after July 1, 1974 it will be even more difficult for us to manage.

8. This motion is brought on by Order to Show Cause because the main action is to be heard on June 26, 1974 and there is insufficient time to move by Notice of Motion.

9. There has been no prior application to any court for the relief sought herein.

(Sworn to by Francesca Aloise on June 20, 1974.)

Notice of Intent to Reduce Public Assistance, Exhibit "A" to Complaint of Applicant for Intervention.

The
City
of
New York

[EMBLEM]

HUMAN RESOURCES ADMINISTRATION
DEPARTMENT OF INCOME MAINTENANCE

Center: Bay Ridge Income Maintenance Center

Address: 674 4th Avenue
Brooklyn, New York 11220

NOTICE OF INTENT TO REDUCE PUBLIC ASSISTANCE
(Prepare original and 4 copies)

Mrs. Francena Aloise
1818 81 Street
Bklyn., N.Y. 11223

Case Name: ALOISE Francesca
Case No.: ADC 2351 81-1
Group: 009
Case Composition:

Name	Relationship	Age
.....	.....	....
.....	.....	....
.....	.....	....
.....	.....	....
.....	.....	....

Notice of Intent to Reduce Public Assistance, Exhibit "A" to Complaint of Applicant for Intervention.

....
....
....
....

This is to advise you that this Department intends to reduce your public assistance grant on (date) 11/28/73 for the following reason(s):

We will reduce your budget as your son is working.

Old Budget		New Budget	
$80.50	Preadded	$80.50	Preadded
80.00	Shelter	80.00	Shelter
$160.50	Depot	$160.50	Needs
		100.64	Employment
		$ 59.86	

You may have a conference at this center to review this decision at any time before the proposed date of reduction of your grat. If you wish a conference please call us at (telephone no.) 630-2125.

(Illegible)
Worker/Income Maintenance Specialist

11/12/73 — Date
009 — Section or Group

(Illegible)
Supervisor

11/12/73 — Date
009 — Section or Group

Notice of Intent to Reduce Public Assistance, Exhibit "A" to Complaint of Applicant for Intervention.

RIGHT TO FAIR HEARING

If you believe that your assistance should not be reduced you may request a state fair hearing by telephoning 488-6550 or by writing to Fair Hearing Section, New York State Department of Social Services, 1450 Western Avenue, Albany, New York 12203. If you request a fair hearing, a notice will be sent to you informing you of the time and place of your hearing. At the hearing, you, your attorney or other representative will have an opportunity to present relevant written and oral evidence as to why this action should not be taken. You will also have an opportunity to question any persons who appear at the hearing to present evidence against you. If you request a fair hearing before the date your assistance is proposed to be reduced you will continue to receive your assistance unchanged until the fair hearing decision is issued.

Decision After Fair Hearing, Exhibit "B" to Complaint of Applicant for Intervention.

STATE OF NEW YORK

DEPARTMENT OF SOCIAL SERVICES

In the Matter of the Appeal of

FRANCENA ALOISE

from a determination by the New York City Department of Social Services (hereinafter called the agency)

DECISION AFTER FAIR HEARING

A fair hearing was held at Two World Trade Center, New York, New York on December 12, 1973, before William Meyers, Hearing Officer, at which the appellant, the appellant's representative and representatives of the agency appeared. The appeal is from a determination by the agency relating to the adequacy of a grant of aid to dependent children. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

(1) Appellant and two minor children are recipients of a grant of aid to dependent children. One of appellant's children, Carmine, is eighteen years of age, not a student, and employed. The agency has been budgeting the household on the basis of three persons and determined to reduce the budgetary needs because of the available net applicable employment income of appellant's minor son.

(2) The agency sent a Notice of Intent to Reduce appellant's grant on November 12, 1973 to be effective Novem-

ber 28, 1973. The appellant requested a fair hearing to review the agency's proposed action on November 19, 1973. The agency was notified by the State Departnent of Social Services that appellant's grant must be contnued without change until a fair hearing decision is issued The agency has continued assistance unchanged to he appellant through the date of this hearing, and the agency has stated that assistance will be continued until a fairhearing decision is issued.

(3) Appellant's son, Carmine, residing n appellant's home, is employed full time and not a student The agency determined to budget the family as follows:

	Sem-monthly
Basic maintenance	$ 80.50
Shelter	80.00
Total needs	$160.50
Net applicable employment income	100.64
Budget deficit	$ 59.86

The agency has not established that appllant's son is making financial contribution to the household and he has indicated an unwillingness to do so.

Section 101.1 of the Social Services Lav provides as follows:

> "The spouse or parent of a recipient ofpublic assistance or care or of a person liable to become in need thereof shall, if of sufficient ability, be responsible for the support of such person, provided hat a parent shall be responsible only for the suppo't of a minor

> child. Step-parents shall in like manner be responsible for the support of minor step-children."

Section 352.16 (a) of the Regulations provides in fact as follows:

> "All income and resources of an applicant for or recipient of aid to dependent children shall be considered in order to determine its availability; such income and resources shall be reasonably evaluated; and, when determined to be available, after policies governing the exemption and disregard of such income and resources have been applied, shall be applied towards meeting the needs of an individual and his dependents."

Section 369.2 (b) of the Regulations provides in fact as follows:

> "A child or minor is eligible if under the age of eighteen; a minor between eighteen and 21 years of age is eligible if he is regularly attending high school, a college or university, or a course of vocational or technical training."

Section 352.30 (d) of the Regulations provides as follows:

> "A non-legally responsible relative or unrelated person in household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15. per month shall be considered as income; for such boarding lodgers, the amount in excess of $60. per month shall be considered as income. In the event a lodger does not contribute at least $15. per month, the family's shelter

Decision After Fair Hearing, Exhibit "B" to Complaint of Applicant for Intervention.

allowance including fuel for heating shall be a pro rata share of the regular shelter allowance."

The evidence establishes that appellant's son being age eighteen and not a student, is no longer eligible for a grant of aid to dependent children. Since he is not legally responsible for the support of his parent or brother and that contributing to the home, his employment income may not be utilized to meet budgetary needs. His needs should be removed from the budget and a prorated ⅔ shelter allowance provided.

DECISION: The agency may reduce recurring grants by removing appellant's son, Carmine's needs from the budget and provide a prorated shelter allowance. The determination of the agency to budget the son's employment income is not and cannot be affirmed. The agency is directed to take appropriate action in accordance with the provisions of Section 358.22 of the Regulations of the State Department.

DATED: Albany, New York
FEB 15 1974

BY CARMEN SHANG
Carmen Shang
ASSISTANT COMMISSIONER

ABE LAVINE
Abe Lavine
COMMISSIONER

Answer of State Defendants in *Hurley* v. *Van Lare*.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ROSE HURLEY, individually and on behalf of her minor dependent children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Plaintiffs,

against

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York,

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York,

LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Defendants.

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72 Civ. 3423

The state defendants answering the Amended Verified Complaint herein by their attorney, Louis J. Lefkowitz, Attorney General of the State of New York, respectfully allege upon information and belief:

1. Deny so much of paragraphs "1" and "2" as alleges that the constitutional claims raised are substantial enough to establish a cause of action under 42 U.S.C. § 1983 and to vest this Court with jurisdiction under 28 U.S.C. § 1343(3) and (4) and that any claim on behalf of welfare recipients to retroactive awards of public assistance benefits is au-

thorized by 28 U.S.C. §§ 2201, 2202, Rule 57 of the Federal Rules of Civil Procedure and/or by 42 U.S.C. § 1983.

2. Deny so much of paragraph "3" as alleges that the constitutional claims alleged are substantial enough to warrant the convening of a three-judge court.

3. Deny so much of paragraphs "5" and "6" as alleges that a class action is proper in the premises and alternatively, if determined to be proper that said class is broader than all residents of the State of New York who are or will be receiving public assistance, and who have had their grants of public assistance reduced, terminated, suspended or denied or who may be threatened with reduction, termination, suspension or denial of public assistance, solely because of the presence of a non-contributing lodger in the home pursuant to 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv).

4. Deny so much of paragraphs "7" and "8" as alleges that defendants Van Lare and Lavine are liable for suit in their individual capacities in this action.

5. Deny paragraph "14" except as it pertains to November and December of 1970 and January and February of 1971 and except as it alleges that plaintiff's male friend was not under any legal obligation to provide financial assistance or support to plaintiff or her children.

6. Deny paragraph "20" except as it alleges that the application of §§ 352.30(d) and 352.31(a)(3)(iv) affected a reduction of $120 in the amount of public assistance paid to plaintiff and her children over a four month period.

7. The state defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations

in paragraph "21" except that said defendants deny that 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv) prevent plaintiff from associating with her male friend.

8. Deny so much of paragraph "22" as recites 18 N.Y.C.R.R. § 352.30(c) on the grounds that the section is not relevant to this action.

9. Deny each and every allegation in paragraphs "24", "25", "26", "27" and "28".

FACTUAL ALLEGATIONS

10. At all times relevant herein plaintiff Hurley has been and continues to be a recipient of public assistance on the AFDC program on behalf of herself and her three minor children Doreen, Jamie and John.

11. From on or about December 8, 1969 until March 5, 1971, plaintiff Hurley and her children resided in a first floor apartment at 210 Hillside Avenue, Mount Vernon, New York, County of Westchester. Said apartment consisted of at least the following rooms: Living room, kitchen with dining area, three bedrooms, and bath. Plaintiff Hurley's actual rent was $150 per month. With the exception of the period of November and December 1970 and January and February 1971, discussed further below, Mrs. Hurley's AFDC unit received a shelter allowance equal to the actual rent. The applicable local maximum was $182 per month.

12. On March 5, 1971, Mrs. Hurley and her children moved from the Hillside Avenue address to 12 Wallace Avenue in Mount Vernon (then her parents' home) and on April 29, 1971, from the Wallace Avenue address to 90 Brookside Avenue, also in Mount Vernon. On or about

November 1, 1973, Mrs. Hurley and her children moved to R.D. #1 Bloomingburg, New York, County of Sullivan.

13. On or about November 28, 1967 the Westchester County Department of Social Services provided Mrs. Hurley's public assistance unit with a grant of $718.50 pursuant to her request for the purpose of obtaining furniture.

14. On or about September 15, 1970, a caseworker from the Westchester County Department of Social Services made an unannounced "home visit" to Mrs. Hurley at the first floor apartment on Hillside Avenue. During the course of that visit the caseworker observed the following items of furniture in the apartment among others: *Living room*—Color console television set; plush velvet sofa; plush velvet arm chairs; coffee table with ornaments; draperies; wall to wall carpet (green); *Master bedroom*—bedroom set; wall to wall carpet (blue); *Twins bedroom*—bunk beds; wall to wall carpet (red); *Doreen's bedroom*—wall to wall carpet; *Kitchen*—five piece dinette set.

15. Upon inquiry to Mrs. Hurley, the caseworker was advised that the foregoing items had been given to Mrs. Hurley by a male friend (one ADR) and that the furniture which had been purchased with the November 18, 1967 grant was stored in the basement with the exception of the furniture in Doreen's room. (A copy of the caseworker's report of the September 15, 1970 "home visit" is annexed hereto and marked Defendants' Exhibit "A" [DXA]).*

16. During the months of November and December 1970, and January and February 1971, Mrs. Hurley's male

* Plaintiffs attorney has advised that he contests the allegations made in the foregoing paragraph. Accordingly, defendants plan to offer proof of these facts at trial and/or through depositions taken subsequently.

friend (ADR) resided with her and the minor children. During this period of time, ADR continued to be employed but did not pay any portion of the shelter costs or contribute to the support of plaintiff or her children.

17. Upon being satisfied that the ADR was in fact residing with Mrs. Hurley at her apartment, Westchester County Social Services advised plaintiff that the public assistance unit's grant would be reduced by $35 per month with reference to the four month period aforesaid.

18. Mrs. Hurley sought a state "fair hearing" with respect to the reduction which was had on March 22, 1971. As a result of the decision thereon the Westchester County action was modified to conform with 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv) and a reduction of $30 per month (⅕ of $150 shelter allowance) was ordered with reference to the four month period.

19. After February 28, 1971, ADR ceased to reside with Mrs. Hurley and there has been no pro-rata reduction in her shelter allowance since that date.

AS AND FOR A FIRST DEFENSE.

20. The Court lacks subject matter jurisdiction because of the insubstantiality of the constitutional claims alleged.*

AS AND FOR A SECOND DEFENSE.

21. 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv) are consistent with federal law and the regulations promulgated pursuant thereto including 42 U.S.C. §§ 602(a)(7), (10) and 606 and 45 C.F.R. § 233.90.*

* Previously argued and repeated herein only for completeness.

* Previously argued and repeated herein only for completeness.

AS AND FOR A THIRD DEFENSE.

22. 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv) do not violate any of plaintiff's rights under the First Amendment of the United States Constitution and/or any constitutional right to privacy.

AS AND FOR A FOURTH DEFENSE.

23. 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv) do not violate any of plaintiff's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

AS AND FOR A FIFTH DEFENSE.

24. 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv) do not violate any of plaintiff's rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, the state defendants pray for judgment dismissing the complaint for want of jurisdiction or alternatively, declaring 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv) constitutional under the First and Fourteenth Amendments and for such other and further relief as the Court deems just and proper on the premises.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Van Lare and Lavine

JUDITH A. GORDON
Assistant Attorney General

(Verified by Judith A. Gordon, June 24, 1974.)

Excerpts From Case Record of Rose Hurley, Exhibit "A" to State Defendants' Answer.

HURLEY, Rose
210 Hillside Avenue
Mount Vernon, New York ADC

5/28/70 Mrs. Hurley called on marginal date to inform worker that her daughter, Doreen, had been confined to Medical Center Hospital in New York City and that she was diagnosed as having cystitis fibrosis. Doreen will be released 5/29/70, and she will need various apparatus at home to help relieve Doreen's condition. Doreen also suffers from diabetes. Mrs. Hurley was informed to apply for state aid by Dr. Denning of the Presbyterian Medical Center, New York City. Mrs. Hurley asked worker to contact Dr. Denning's secretary a Mrs. Cheronxeau, 212-579-2285. Mrs. Hurley maintains that Dr. Denning's secretary would inform worker more on Doreen's condition.

Telephone Call 5/28/70 Mrs. Keane
Worker contacted Mrs. Keane, supervisor of Social Work, White Plains to receive instructions as to how to inform Mrs. Hurley to apply for state aid. Mrs. Keane maintains that Mrs. Hurley is to obtain form #MR 14, issued by the Westchester Health Department and forward this to Dr. Denning.

Worker informed Mrs. Hurley on this date.

5/28/70 *Telephone Call:*
Worker returned phone call to Mrs. Ford, a public health nurse, at the Mt. Vernon Health Service stating that our agency was aware of the Hurley situation.

Telephone call 5/28/70:
Worker also contacted Mrs. Clark, supervisor of nurse services in White Plains, ext. 592. She, Mrs. Clark also maintains that Mrs. Hurley is to send forms MR-14 to Dr. Denning's office at Presbyterian Hospital. This form is to be completed and returned to the County Office Building in White Plains.

6/4/70 It was agreed that we would pay Mrs. Carmella Williams $90.00 per week for 3 week period totaling $270.00. At this time Purchase of Service was set up for in-home day care to Mrs. Carmella Williams. It was also agreed on 6/10/70, that Mrs. Anna DeAnna, Mrs. Hurley's aunt, would receive a one issue purchase of service for $120.00 the length of time 2/27/70 to 3/20/70 $40.00 per week as Mrs. DeAnna manages Mrs. Hurley's grant when Mrs. Hurley was confined. Mrs. DeAnna, also agreed to this amount.

9/15/70 *Home Visit and Reinvestigation:*
Since worker had not visited the Hurley's household, since Mrs. H. had moved downstairs, worker made an unannounced home visit to the Hurley's household. Mrs. Rose Hurley lives in a 6 room apartment on the first floor of a two family house. The rent remains $150.00 and the utilities are extra. The security has been transferred from Mrs. Hurley's upstairs apartment to her downstairs apartment. The landlord is Mr. Peter Adamo, PE-8-3162 of 18 Maple Avenue, Pelham, New York. Mrs. Hurley claims that she was able to obtain this apartment after the Adamo's separated and are now divorced. There is no verification of rent and worker asked that receipt

for three months be presented to our office by 9/28/70, or we will hold her 10/1 grant. Mrs. Hurley lives with her three children and Mrs. Hurley's husband's whereabouts are unknown. Mrs. Hurley is seeking a divorce but has not filed for one as of yet. Mrs. Hurley claims she has not "gotten around to obtaining one".

Health:
The twins, Jamie and John, born 8/9/67, are fine; their health is good; their physician is Dr. Kessler of Mount Vernon. Daughter, Doreen 4/18/62, is a diabetic for which Mrs. Hurley gives her insulin, Globin N-40, every morning. Mrs. Hurley maintains that Doreen will be taught to administer these injections by the Mt. Vernon Nursing Service. Doreen was hospitalized on 5/12/70, released either 5/29 or 6/4/70 from the Presbyterian Hospital, New York City for cystitis fibrosis (see correspondence). Mrs. Hurley stated that this occurrence placed a great strain on her physical as well as her mental health. She stated that she would visit Doreen every day, getting the twins prepared to stay with their grandparents each day, traveling back and forth to New York City and returning for evening visits to see Doreen. After Doreen was discharged from the hospital, she placed additional strain on her mother as she was very demanding by being bedridden. Mrs. Hurley claims that Doreen was promoted to the third grade considering what she had experienced medically in the last year. Doreen had a tutor from the Board of Education. Doreen attends St. Catherine's Parochial School in Pelham, New York. Mrs. Hurley expressed satisfaction over Doreen's im-

provement but she maintains that Doreen must be given special attention due to her condition.

At this time, worker questioned Mrs. Hurley as to her new furniture. Mrs. Hurley maintains that her boyfriend, a Mr. [ADR], helps her out and that he completely furnished her apartment. The living room comprise of colored console television, spanish mediterranean plush velvet sofa of red and green. The two high back plush velvet arm chairs are of green and red and there are gold and black draperies in this living room. There is also green wall to wall carpeting and a very heavy ornamentated spanish mediterranean coffee table with two crystal ornaments. In the master bedroom, Mr. [ADR] has purchased a huge mediterranean bedroom set and blue wall to wall carpeting. The twins room is in a red and white with red and white bunk beds and red wall to wall carpeting. Doreen's furniture remains the same but Mr. [ADR] has also placed wall to wall carpeting in her room. Mrs. Hurley claims that Mr. [ADR] has several businesses and that he is in his early 30's and that he lives at 240 East Prospect Avenue, Mt. Vernon. His apartment, she maintains makes hers look like nothing, in other words there is no comparison between the two. In the kitchen Mr. [ADR] has purchased a beautiful 5 piece dinette set which has high back chairs of black vinyl and a hexagon shaped dinette table. When worker questioned Mrs. Hurley about previous furniture, she claim that she had stored most of these in the basement because some day she plans to marry Mr. [ADR] and have a home of her own in which these items may be placed also.

Partial Stipulation of Facts in *Taylor* v. *Lavine.*

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 Civ. 699

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly siutated,

Plaintiffs,

against

ABE LAVINE, individually and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually and in his capacity as Commissioner of the Nassau County Department of Social Services,

Defendants.

IT IS HEREBY STIPULATED AND AGREED by and between attorneys for the respective parties that following facts are agreed upon in the above-entitled action:

PLAINTIFF TAYLOR

1. At all times relevant herein plaintiff Annie Taylor has been and continues to be a recipient of public assistance on the AFDC program on behalf of herself and her minor child Margaret.

2. At all times relevant herein, plaintiff Taylor and her child have resided in an apartment 148 North Main Street,

Freeport, New York, County of Nassau. Said apartment consists of at least the following rooms: Living room, kitchen, one bedroom, and bath. Until June 1, 1974, the actual rent for the apartment was $180.00 per month. The lease for the apartment was held by plaintiff Taylor.

3. At all times relevant herein, plaintiff Taylor's sister, Virginia Taylor, has resided with the plaintiff and her minor child. Virginia Taylor is 24 and disabled. Virginia Taylor has no legal obligation to contribute to the support of plaintiff Taylor or plaintiff's minor child.

4. At all times relevant herein prior to January, 1973, plaintiff Taylor received a shelter allowance of ⅔ of the Nassau County maximum for an apartment of 3-4 rooms (with heat) accommodating 3 people, or $110 monthly (⅔ x $165). Virginia Taylor received public assistance on the home relief program and by reason thereof received ⅓ of the local maximum, or $55 monthly, as her shelter allowance. The Taylors made up the difference between the local maximum and their actual rent ($15 monthly) from their "basic" or "pre-added" grants.

5. Effective January 1, 1973, Virginia Taylor's home relief was discontinued by the County on the grounds of non-eligibility. She did not seek a state "fair hearing" and does not contest the validity of the discontinuance in this proceeding.

6. During the months of January and February, 1973, Virginia Tayor was without public assistance, and had no other income. She did not pay any portion of the shelter costs and did not contribute to the support of plaintiff Taylor or plaintiff's minor child. Plaintiff Taylor continued to receive a monthly shelter allowance of ⅔ of $165.

7. In January 1973 plaintiff Taylor requested that the County Department of Social Services adjust her "basic" grant to reflect an assistance unit of two persons rather than ⅔ of a three person unit and to adjust her shelter allowance to the maximum for a 2-4 room apartment accommodating 1-2 persons under the local schedule, or $145 monthly. Plaintiffs request as to the "basic" grant was allowed and her request as to the shelter allowance denied.

8. Plaintiff sought a state fair hearing on the denial of her request as to the shelter allowance. The hearing was conducted on March 14, 1973. By decision dated April 20, 1973, the County's determination was sustained on the ground that Virginia Taylor was a "non-contributing" lodger under § 350.30(d) for the two month period in issue. The decision states in part as follows:

> "(1) Appellant and her daughter are recipients of aid to dependent children.
>
> (2) Living with them is appellant's sister who is not in reciept of public assistance and who does not contribute to the rent.
>
> (3) The maximum rent as per filed schedules for an apartment, such as appellant's, for two persons is $145 and for three persons it is $165.
>
> (4) The agency has budgeted appellant's shelter allowance at ⅔ of $165.00, or $110.00.
>
> (5) Appellant claims that it should be budgeted at $145, the maximum for 2 persons, since the third person does not contribute anything to the rent.
>
> Pursuant to Section 352.30(d) of the regulations of the State Department of Social Services a non-legally relation in the household who is not receiving public assistance shall be deemed a lodger. In the event the

lodger does not contribute at least $15.00 per month, the family's shelter allowance shall be [a] pro rata share of the regular shelter allowance. Therefore, the agency's determination to allow the appellant a shelter allowance in the amount of $110 was correct and in accordance with the above cited regulation.

Decision: The determination of the agency is affirmed."

9. As a result of the reduced shelter allowance payable to the Taylor sisters and plaintiff's minor child during January and February of 1973, arrears equal to a portion of one month's rent accrued. On the basis of these arrears a warrant of eviction issued against plaintiff Taylor which she nullified by payment out of the proceeds of her April 1973 "basic" grant.

10. Effective March 14, 1973, Virginia Taylor was restored to public assistance in the Aid to the Disabled category. On or about January 1, 1974 her case was transferred to the SSI program which is directly federally funded. On both programs, a portion of her grant is attributable to her shelter costs and is not challenged as inadequate herein.

PLAINTIFF OTEY

11. At all times relevant herein plaintiff Charlotte Otey has been and contniues to be a recipient of public assistance in the AFDC program on behalf of herself and her minor child, Kevin.

12. At all times relevant herein, plaintiff Otey has resided with her minor child at 30B Waverly Avenue, Freeport, New York, County of Nassau. The apartment con-

sists of at least the following rooms: Living room, kitchen, two bedrooms and bath. The actual rent is for the apartment is $145. Subsequent to February 1974, plaintiff received a shelter allowance of $145 monthly, the local maximum for a 2-4 room apartment accommodating 2 people, or her actual rent.

13. On or about October 1, 1972, Michael Otey, plaintiff's adult son, age 24, came to reside with plaintiff at the Waverly Place apartment. During his residence there, Michael Otey was unemployed except for occasional temporary jobs. He was not obligated to support plaintiff or her minor child. He did not pay any portion of the rent and did not make any contribution to plaintiff. Michael Otey has resided with plaintiff on several occasions prior to October of 1972 and after he had reached the age of 18 years.

14. On or about October 26, 1972, plaintiff Otey was advised that her shelter allowance would be reduced for the following reason: "You must share shelter with your son, Michael Otey. Your share of shelter is $96.65 [⅔ x $145]."

15. On November 8, 1972 plaintiff Otey requested a state "fair hearing." However she failed to appear because Michael had advised her that he would either find a job and contribute to the household or leave the state to stay with relatives in West Virginia. Neither of these events occurred.

16. The reduction in plaintiff Otey shelter allowance became effective in February 1973. However, in that month in order to forestall eviction because of arrears of $48.34, the local agency paid plaintiff's landlord an additional $45 which it then recouped out of plaintiffs March 1973 basic grant.

Partial Stipulation of Facts in Taylor v. *Lavine.*

17. After a state "fair hearing" the April 1973 recoupment was found improper by the state because the plaintiff was not directly threatened with eviction and the amount of the recoupment was restored.

18. On or about February 1, 1974, Michael Otey left plaintiff Otey's apartment to reside independently. Since that date he has received public assistance on the home relief program and the reduction in plaintiff Otey's shelter allowance has been discontinued.

IT IS FURTHER STIPULATED AND AGREED that either side shall have the right to supplement the foregoing statement of facts.

Dated: New York, New York
June 25, 1974

s/ Leonard Clark
LEONARD CLARK, Esq.
Attorney for Plaintiffs
Taylor and Otey

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant Lavine
By .....

s/ Judith A. Gordon
JUDITH A. GORDON
Assistant Attorney General

Supplemental Affidavit of Rose Hurley in Support of Motion for Class Action and Summary Judgment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 3423 A.B.

ROSE HURLEY, et al.,
Plaintiffs,
—against—
BARRY VAN LARE, et al.,
Defendants.

STATE OF NEW YORK
COUNTY OF SULLIVAN } ss.:

ROSE HURLEY, being duly sworn, deposes and says that:

1. I am the named plaintiff in the above-entitled action. I make this affidavit to supplement and bring up-to-date my affidavit of January 16, 1973, in support of plaintiffs' motions for summary judgment and a class action determination.

2. When I resided at 90 Brookside Avenue, Mount Vernon, New York, I had 4½ rooms, including two bedrooms. One bedroom was for myself, one for my two daughters. I converted a closet into a bedroom for my son. The monthly rental for this apartment was always $175, except that some time in 1973, the rent was raised to approximately $200 per month. The Westchester County Department of Social Services paid this full $200 per month. The male friend referred to in my prior affidavit did not reside with me at any time after February, 1971, because I feared that if he did my shelter allowance would be re-

duced as it was in the past because of his presence in the home. I last saw him approximately six months ago.

3. Because of the health problems of my oldest daughter, Doreen,—she has cystic fibrosis—I moved to Bloomingburg, New York, in late August, 1973. I rent a house at a
(R. H.) rental of $210 per month, for which the Department of
210
Social Services provides me with ~~$117~~ per month for rent. The total monthly A.F.D.C. welfare grant for my three children and myself is $441.

4. My present home consists of three bedrooms, a living room, a dining room and a kitchen. I have one bedroom, my oldest daughter, Doreen, has one bedroom, and my other two children, Jamie, age 7, and John, age 7, who are twins, share the third bedroom.

5. About five months ago I met a man who resides in the area of my present residence. He is paying for the legal fees in a divorce proceeding I have brought against my husband, whose whereabouts are unknown. He does not provide any support to my children and I, and has no legal obligation to provide such support. This man would have resided with my children and I for the past four months and would continue to reside with us if it were not for the fact that if he resided with us, the Department of Social Services would reduce our shelter allowance. I fear allowing anyone to reside with us because it will result in the reduction of our shelter allowance.

6. This man and I would like to get married some time after November, 1974, assuming that my divorce proceeding will be completed by then.

WHEREFORE, I respectfully pray this Court grant my motions for summary judgment and a class action determination.

(Sworn to by Rose Hurley, June 21, 1974.)

Second Supplemental Affidavit of Rose Hurley in Support of Motion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF WESTCHESTER } ss.:

ROSE HURLEY, being duly sworn, deposes and says that;

1. I am the named plaintiff in the above entitled action. I make this affidavit to further supplement my prior affidavits in support of plaintiffs' motions for summary judgment and a class action determination. I have personal knowledge of all of the facts set forth herein.

2. When my grant was reduced by The Department of Social Services in November and December, 1970 and January and February, 1971, I resided at 210 Hillside Avenue, Mount Vernon, New York. I had five (5) rooms: one bedroom, in which I resided with my two younger children; a smaller bedroom, in which my older daughter resided; a kitchen, dining area and living area. Because my two younger children (who are twins) are male and female, I found it necessary to convert the dining area into a bedroom for one of the younger children. My rental at all times that I resided at 210 Hillside Avenue was $150.

3. In July, 1971, I moved to 90 Brookside Avenue, Mount Vernon, New York. There I had four and one half rooms, including two bedrooms. One bedroom was for myself, one for my two daughters. I converted a closet

Second Supplemental Affidavit of Rose Hurley in Support of Motion.

into a bedroom for my son. The monthly rental for this apartment was always $175, except that some time in 1973, the rent was raised to approximately $200 per month. The Westchester County Department of Social Services paid this full $200 per month.

4. I moved to Bloomingburg, New York in August, 1973. My rental here is $210 per month, which is paid by the Department of Social Services. My present home consists of three bedrooms, a living room, a dining room and a kitchen. I have one bedroom, my oldest daughter, Doreen, has one bedroom and my other two children share the third bedroom.

5. I have never had more space than is necessary for my children and I.

WHEREFORE, I respectfully pray that this Court grant my motions for summary judgment and a class action determination.

(Sworn to by Rose Hurley, July 5, 1974.)

Supplemental Affidavit of Phyllis D'Alessio in Support of Motion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

PHYLLIS D'ALESSIO, being duly sworn, deposes and says that:

1. I am one of the proposed intervenors in the above-captioned action. I make this affidavit to supplement my affidavit of February 6, 1973, which was submitted in support of my motions to intervene as a party plaintiff in the above action, for a preliminary injunction and class action determination. I have personal knowledge of all of the facts set forth herein.

2. My apartment at 40 South West Street, Mount Vernon, New York, consists of five rooms, including two bedrooms. Mr. Mottola and I share one bedroom, my two daughters share the other bedroom and sleep on double decker beds. We have a kitchen, a living room and a tiny room about as big as a closet in which I keep my refrigrator. The space is the minimum for myself and two daughters. Mr. Mottola does not take up any space beyond that which is the minimum needed by my daughters and myself.

3. Mr. Mottola is not a recipient of public assistance, does not and is not able to work, and has not and does not provide any support to my children and I. He recently

spent three weeks in the Veterans' Administration Hospital because of his high blood pressure.

4. The size of the rooms in my apartment at 40 South West Street are as follows: my bedroom is 12′ x 15′, the children's bedroom is 8′ x 10′, the living room is 12′ x 14′, the room with the refrigerator is 5′ x 6′, and the kitchen is 9′ x 13½′.

WHEREFORE, I respectfully pray that this Court grant my motions to intervene, for a preliminary injunction and class action determination.

(Sworn to by Phyllis D'Alessio, June 25, 1974.)

Supplemental Affidavit of Loretta Clark in Support of Motion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF ERIE
CITY OF BUFFALO } ss.:

LORETTA CLARK, being duly sworn, deposes and says:

1. That I am one of the proposed intervenors in the above captioned action. I make this affidavit in support of my motions to intervene for a preliminary injunction on behalf of myself and my minor children.

2. That this affidavit is to supplement and bring up to date my affidavit of March 21, 1973, submitted in the Hurley Action in support of motions to intervene on behalf of myself and my minor children.

3. My five minor children and I are citizens of the United States and residents of Buffalo, New York, and reside together at 249 Moselle, Buffalo, New York. I was divorced in September, 1967 and have not seen, heard or been in contact with my husband for several years and do not know where he presently can be located.

4. I am forty (40) years of age and reside with my five minor children, Loretta Jean Clark, age 13, Betty Anne Clark, age 12, Lillian Marie Clark, age 10 and Clara and Dawn Clark, twins, age 7, and my male friend, Sidney Ray, who is forty-five (45) years of age.

5. My five minor children and I are receiving public assistance pursuant to the federal-state AFDC program and have been receiving such assistance for approximately the last thirteen years.

6. I currently receive outpatient treatment for nervous tension once weekly at the Meyer Memorial Hospital in Buffalo.

7. My oldest daughter, Loretta Jean, was born with a congenital heart defect known to me as "blue baby" and she continues to receive outpatient care several times per month at Children's Hospital in Buffalo.

8. My male friend and I have lived together for about five years. During that period he has helped with housework, and preparing meals, and he has looked after the children when I have been ill or when I have to take one of my children on an errand. Mr. Ray and I intend to live together in the future, but we do not, at this time, intend to marry.

9. Mr. Ray is supported by his Social Security Disability payments, which are $128.00 per month. Mr. Ray generally pays for his own share of the household food budget. Mr. Ray also makes occasional gifts of clothing to my children; however, he does not appear willing or able to undertake actual support of me or any of my children.

10. Prior to November 1, 1972, my semi-monthly public assistance grant was $204.00; but thereafter the grant was reduced further because I received a notice dated December 6, 1972 from the Erie County Department of Social Services that my grant would be reduced to $174.60. See Exhibit

"A". That reduction was delayed pending an administrative appeal.

11. A fair hearing was held on January 8, 1973 and at that time the agency revised the amount of reduction to $187.90 because Mr. Ray was unemployed and had no income whatever. In a fair hearing decision dated February 14, 1973 the Commissioner of the Department of Social Services affirmed the determination that my grant should be reduced to $187.90. See Exhibit "C".

12. Presently I receive a semi-monthly public assistance grant of $208.00 from the Erie County Department of Social Services for myself and my children. This grant includes the scheduled flat grant for six people and 6/7 of my fuel allotment and 6/7 of my rent allotment. The rent and fuel allotments for myself and my children have been reduced because of Mr. Ray's presence in my home.

13. The health and welfare of my children and myself has been endangered because of the reduction of my public assistance grant. For example, the Erie County Department of Social Services has recently authorized me to retain ownership of a 1968 Ford station wagon on grounds that a car is essential to travel to and from medical providers, but no extra money is available to operate the car. Therefore my family's subsistance budget is already severely strained, and a reduction of assistance will simply mean less food for my children.

WHEREFORE, I respectfully pray this Court grant my motion to intervene and for a preliminary injunction.

(Sworn to by Loretta Clark, June 20, 1974.)

Affidavit of Susan E. Smith in Support of Motion.

[SAME TITLE]

1. I am a Research Analyst employed by the Bureau of Social Science Research, Inc., a private corporation located in Washington, D. C. I hold a Master's Degree in Political Science.

2. The Bureau of Social Science Research was founded approximately 23 years ago by the present director, Robert T. Bower.

3. The function of the BSSR is to conduct research in the social science area and to contribute to the advancement of social science theory and methodology. Approximately 80 percent of the work is survey research. The Bureau is supported by government contracts and through private foundation grants.

4. In my capacity as a research analyst at the Bureau of Social Science Research, I recently obtained U. S. Census data from the Bureau of Census report titled *Detailed Characteristics* (PC1-D Series) on the number of households in the state of New York which have persons besides the spouse or children of the head of the household living within the household. Data tables in this publication show the number of households which have various relatives (grandchild, parent, son or daughter-in-law, brother or sister, or other relative of the head of the household or a non relative "lodger" living within the household. These data are provided for six different types of household heads: white male, white female, black male, black female, Puerto Rican male, Puerto Rican female. According to the Census definitions, all persons living in the

household who were not in one of the relative categories are classified as "lodger (or partner)." The 1970 Census of Population and Housing, questionnaire items and the Bureau of Census explanation of the terms are appended to this affidavit.

5. In addition, from the same U. S. Census publication, I obtained the median income and the percentage living below the poverty level within each of the six heads of household groupings listed above.

6. The first page of the data tables for each of the above cited items of information are appended to this affidavit.

7. The results of the computations are shown in the attached Figure 1.

8. This table clearly shows that, in general, those groups of heads of household with the lowest median income (White, Black and Puerto Rican females) and, similarly, the largest percentage of persons living on income below the poverty level, are considerably more likely to have one or more persons besides their immediate families living within their households than are those in the higher income groups.

(Sworn to by Susan E. Smith, June 23, 1974.)

Table, Exhibit "A" to Smith Affidavit.

(See opposite ☞)

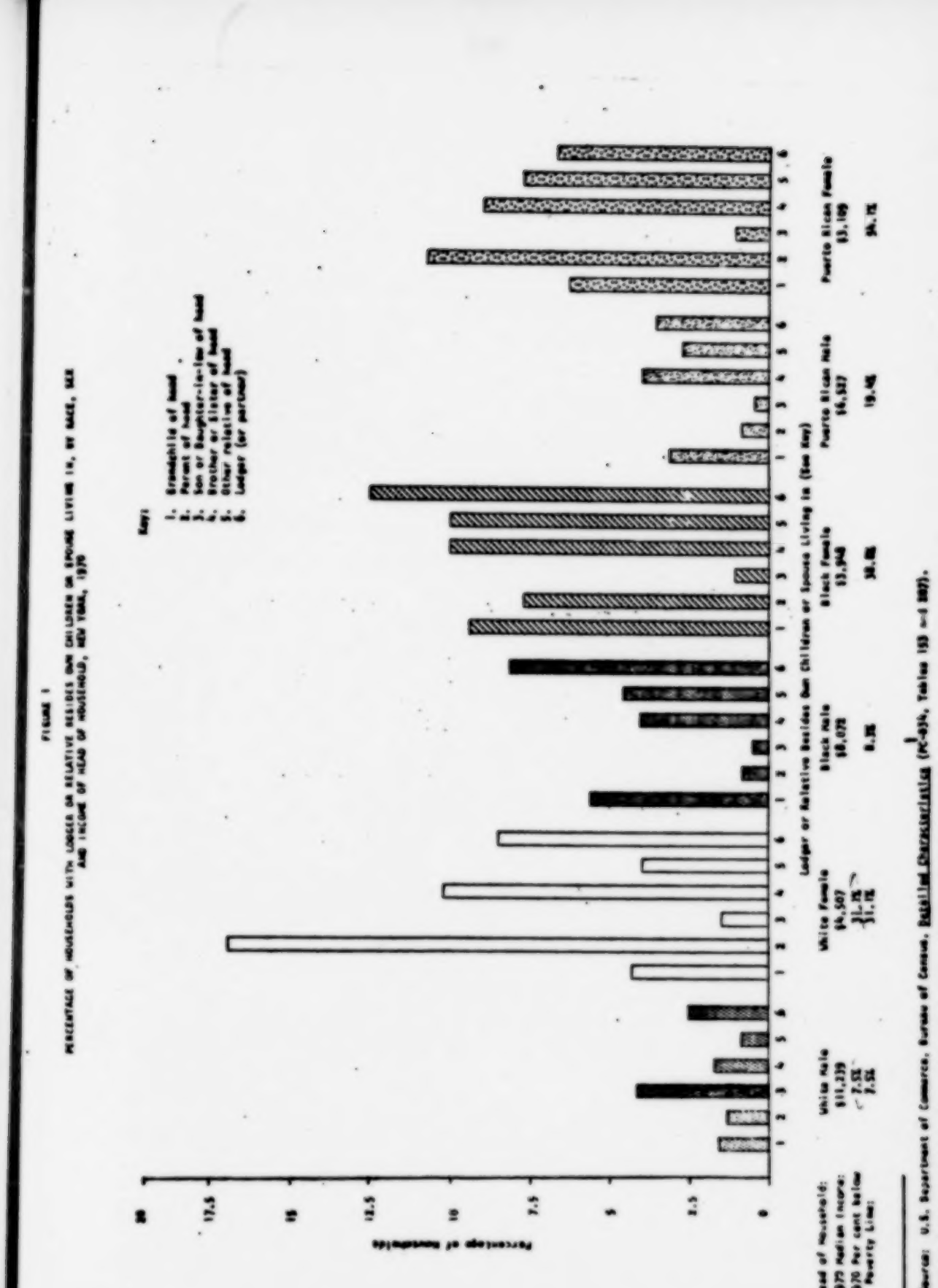


FIGURE 1

PERCENTAGE OF HOUSEHOLDS WITH LODGER OR RELATIVE BESIDES OWN CHILDREN IN, BY RACE, SEX AND INCOME OF HEAD OF HOUSEHOLD, NEW YORK, 1970

Source: U.S. Department of Commerce, Bureau of Census, Detailed Characteristics (PC-D36, Tables 153 and 227).

Detailed Characteristics, New York 1970 Census of Population, Exhibit "B" to Smith Affidavit.

(See opposite ☞)

Table 153. Persons in Households by Relationship to Head, 1970 and 1960, and by Race and Sex, 1970—Continued

(Data based on sample, see text. For minimum base for derived figures (percent, median, etc.) and meaning of symbols, see text)

The State Urban and Rural Standard Metropolitan Statistical Areas of 250,000 or More	Total in households	Persons by relationship to head of household: Head of household: Total (number of households)	Head of household: Head of family: Primary individual	Head of household: Head of family: Married, wife present	Family members other than head: Wife of head	Child of head	Grandchild of head	Parent of head or wife	Son or daughter-in-law of head	Brother or sister of head or wife	Other relatives of head	Secondary individuals in households: Lodger, his partners	Resident employee
THE STATE — Continued													
White													
Male, 1970	7 436 998	4 050 752	412 718	3 638 034	3 493 334	...	3 054 631	53 636	47 787	17 469	89 085	39 646	98 010	2 999
Percent	100.0	54.5	5.6	49.0	47.0	...	41.1	0.7	0.6	0.2	0.9	0.4	1.3	
Under 5 years	630 828	-	-	-	-	...	602 616	20 775	-	-	807	3 050	3 658	122
5 to 9 years	719 169	-	-	-	-	...	699 702	11 725	-	-	916	3 038	3 645	143
10 to 14 years	742 371	1 058	103	955	854	...	722 872	8 918	7	27	1 776	3 972	3 992	199
15 to 19 years	636 386	14 379	3 734	10 645	9 810	...	595 534	6 860	6	663	5 541	5 013	6 178	414
20 to 24 years	493 415	300 434	34 372	166 062	160 194	...	351 993	3 249	14	6 927	6 911	4 302	11 950	236
25 to 29 years	488 112	384 139	42 737	341 402	332 711	...	79 492	1 081	24	3 721	13 008	2 451	6 261	133
30 to 34 years	617 572	372 556	31 136	341 420	332 058	...	31 773	408	96	1 860	3 195	1 290	6 987	199
35 to 39 years	439 205	386 993	27 210	359 783	348 794	...	22 184	179	178	1 422	3 241	872	5 006	205
40 to 44 years	468 632	437 877	28 963	408 894	394 091	...	18 075	103	229	1 352	4 799	986	6 129	164
45 to 49 years	470 795	446 320	28 426	417 894	401 508	...	13 231	72	494	1 131	5 397	857	4 129	164
50 to 54 years	441 913	420 412	28 109	392 303	375 774	...	8 567	96	959	885	6 122	741	3 984	147
55 to 59 years	414 999	396 006	31 454	364 552	349 514	...	4 494	96	2 133	602	6 751	747	4 035	135
60 to 64 years	360 489	342 563	35 690	306 873	294 037	...	2 007	81	3 784	393	6 340	936	4 347	158
65 to 69 years	272 367	255 675	35 380	220 295	210 030	...	971	-	5 595	136	4 730	1 028	4 088	166
70 to 74 years	204 766	187 314	33 608	153 706	145 472	...	542	9	8 219	100	3 960	1 156	3 434	32
75 to 79 years	135 583	119 786	27 311	92 475	85 932	...	396	-	9 480	19	2 339	999	2 514	20
80 to 84 years	70 619	57 871	15 796	42 025	37 348	...	312	-	8 961	19	1 159	742	1 581	24
85 years and over	38 777	27 619	8 669	18 750	15 607	...	1 010	4	7 638	12	613	816	1 232	33
14 years and over	5 484 065	4 050 752	412 718	3 638 034	3 493 334	...	3 173 617	13 921	47 785	17 469	66 379	23 837	87 962	2 393
Under 18 years	2 517 960	3 878	562	3 316	2 913	...	2 434 745	45 978	15	204	5 653	13 118	13 659	712
Female, 1970	8 067 431	1 162 913	732 812	431 101	...	3 487 944	2 871 374	50 399	197 361	15 435	119 368	46 357	100 509	10 939
Percent	100.0	14.4	9.1	5.3	...	43.2	35.6	0.6	2.4	0.2	1.5	0.6	1.2	0.2
Under 5 years	603 112	-	-	-	...	-	576 060	19 716	-	-	626	3 148	3 363	201
5 to 9 years	688 100	-	-	-	...	-	667 940	11 479	-	-	1 245	3 913	3 344	218
10 to 14 years	716 317	294	157	137	...	293	695 390	8 566	6	20	2 440	5 087	3 315	211
15 to 19 years	633 698	7 301	4 536	2 765	...	32 085	563 384	6 547	-	2 664	6 103	3 987	9 245	563
20 to 24 years	524 304	54 103	19 652	34 451	...	263 344	209 642	2 742	28	6 298	7 167	4 821	25 278	1 312
25 to 29 years	442 204	53 988	16 717	37 271	...	381 585	53 628	651	88	2 596	4 757	2 108	12 077	1 190
30 to 34 years	443 034	54 103	19 652	34 451	...	351 137	25 162	201	307	1 105	3 681	1 259	5 253	826
35 to 39 years	442 204	53 988	16 717	37 271	...	356 950	19 743	226	438	739	4 389	1 000	3 942	789
40 to 44 years	501 943	66 526	22 054	44 472	...	402 992	18 520	75	1 213	607	5 964	1 097	3 807	1 142
45 to 49 years	521 846	78 077	30 634	47 443	...	410 478	15 750	82	2 769	669	8 030	1 282	3 908	1 071
50 to 54 years	498 786	92 705	45 431	47 274	...	371 310	11 236	51	6 418	377	10 454	1 108	4 129	1 441
55 to 59 years	465 572	111 064	68 176	42 888	...	318 142	7 338	69	11 618	263	12 084	1 425	4 481	1 607
60 to 64 years	417 407	130 665	95 442	35 223	...	261 577	3 552	111	19 769	109	13 910	1 626	4 147	1 310
65 to 69 years	352 211	136 370	109 065	27 305	...	164 395	1 526	5	28 142	43	13 617	2 062	4 147	1
70 to 74 years	290 576	133 009	108 794	24 215	...	102 628	817	5	35 956	50	10 760	2 478	3 987	886
75 to 79 years	196 624	97 030	78 996	18 034	...	49 170	389	-	26 656	31	7 472	2 680	2 722	524
80 to 84 years	109 320	54 177	43 556	10 621	...	15 762	279	3	30 027	39	4 270	2 548	1 979	238
85 years and over	65 572	26 640	20 428	6 212	...	7 175	1 018	-	23 926	15	2 339	2 721	1 597	141
14 years and over	6 204 174	1 163 913	732 812	431 101	...	3 487 944	1 070 692	12 165	197 361	15 435	115 806	25 453	91 054	14 351
Under 18 years	2 417 481	1 309	516	693	...	6 569	3 327 863	43 874	6	816	7 309	15 848	13 123	863
Negro														
Male, 1970	958 916	412 928	71 345	340 683	317 582	...	649 088	22 776	3 384	1 389	16 516	19 816	33 547	663
Percent	100.0	43.0	7.4	35.5	33.1	...	66.8	2.4	0.4	0.2	1.7	2.0	3.5	0.1
Under 5 years	115 387	-	-	-	-	...	100 276	9 740	-	-	380	2 879	2 124	10
5 to 9 years	126 882	-	-	-	-	...	117 223	4 926	-	-	478	2 330	2 013	13
10 to 14 years	117 083	245	37	208	172	...	108 067	3 541	-	-	885	2 489	1 827	9
15 to 19 years	89 813	2 927	608	2 319	1 999	...	76 933	2 711	-	189	2 313	2 932	1 789	19
20 to 24 years	62 370	25 826	7 786	18 040	15 235	...	25 824	958	-	777	3 035	2 553	3 381	16
25 to 29 years	65 055	27 387	7 063	20 324	17 464	...	7 751	362	5	496	2 042	1 530	3 248	33
30 to 34 years	59 688	31 922	7 077	24 845	21 215	...	4 050	163	46	260	1 315	988	2 830	16
35 to 39 years	57 641	30 413	7 292	23 121	20 786	...	3 308	125	40	131	987	583	2 570	27
40 to 44 years	51 649	45 927	7 272	38 705	36 016	...	2 202	84	74	139	1 207	644	2 841	37
45 to 49 years	40 876	36 246	6 245	30 001	27 848	...	1 353	82	125	102	897	556	2 564	43
50 to 54 years	32 660	29 132	5 619	23 513	21 775	...	804	12	314	34	788	440	2 185	53
55 to 59 years	26 495	23 341	5 249	18 092	16 703	...	619	35	257	37	622	333	1 816	42
60 to 64 years	19 939	17 448	5 039	12 409	11 434	...	251	17	405	8	676	286	1 445	46
65 to 69 years	12 799	10 927	3 539	7 388	6 613	...	165	-	555	10	436	134	1 176	30
70 to 74 years	7 110	5 866	2 123	3 743	3 344	...	96	-	412	5	309	206	819	25
75 to 79 years	3 372	2 619	1 118	1 501	1 325	...	58	-	316	-	103	101	451	15
80 to 84 years	2 397	1 569	563	1 006	849	...	44	-	340	6	31	81	241	10
85 years and over	622 030	412 028	71 345	340 683	317 582	...	191	-	395	18	30	82	307	5
14 years and over	419 164	1 132	108	1 024	908	...	143 896	3 205	3 384	1 302	15 061	11 972	27 865	617
Under 18 years						...	378 777	20 033	-	53	2 923	9 311	6 922	43
Female, 1970	1 165 763	931 648	94 373	157 367	...	315 515	666 761	23 686	19 687	2 693	25 077	25 111	31 892	6 351
Percent	100.0	27.0	8.2	13.7	...	27.5	38.8	2.1	1.7	0.2	2.2	2.2	2.8	0.6
Under 5 years	114 677	-	-	-	...	-	98 424	10 305	-	-	476	3 418	2 034	14
5 to 9 years	124 460	-	-	-	...	-	114 911	5 061	-	-	512	2 287	1 671	18
10 to 14 years	116 133	77	31	46	...	99	106 528	2 779	-	-	1 170	2 865	1 555	60
15 to 19 years	98 097	2 656	687	1 969	...	5 296	77 135	2 893	3	618	3 191	3 896	2 252	159
20 to 24 years	95 398	30 512	5 156	15 356	...	33 678	26 735	920	27	966	4 285	3 421	4 434	440
25 to 29 years	93 377	30 275	6 179	24 096	...	48 191	7 919	325	97	357	2 716	1 780	3 291	561
30 to 34 years	85 755	29 072	5 352	23 720	...	44 157	4 106	143	119	242	1 902	1 124	3 371	554
35 to 39 years	77 427	27 120	5 394	21 726	...	41 860	3 131	68	184	90	1 517	866	3 016	575
40 to 44 years	73 625	27 502	7 187	20 315	...	38 078	2 153	39	625	57	1 451	812	3 246	662
45 to 49 years	64 602	25 001	9 523	15 478	...	32 317	1 482	50	975	26	1 478	522	3 015	736
50 to 54 years	54 140	21 741	10 242	11 499	...	24 955	903	23	1 691	51	1 536	304	1 819	717
55 to 59 years	43 719	18 543	10 850	7 693	...	17 951	501	38	2 334	19	1 332	599	1 567	815
60 to 64 years	36 264	16 659	10 846	5 813	...	12 436	392	18	2 848	18	1 207	672	1 514	1 010
65 to 69 years	28 519	14 175	9 620	4 544	...	8 157	125	-	2 997	13	1 043	672	1 198	377
70 to 74 years	17 922	9 222	6 568	2 654	...	3 874	84	4	2 900	6	611	472	648	103
75 to 79 years	10 073	5 142	3 727	1 415	...	1 528	66	-	2 139	14	326	330	475	53
80 to 84 years	5 287	2 519	1 934	585	...	540	29	-	1 261	16	195	329	368	30
85 years and over	4 294	1 426	1 068	358	...	443	137	-	1 394	-	131	304	338	43
14 years and over	812 827	251 640	94 373	157 367	...	315 515	145 090	3 206	19 607	2 693	23 247	12 227	26 324	6 378
Under 18 years	616 820	470	130	340	...	1 135	373 077	21 161	3	178	3 682	10 719	6 338	142

Table 207. Poverty Status in 1969 and Ratio of Family Income to Poverty Level for Persons in Families a Unrelated Individuals, by Family Relationship, Age, and Race: 1970—Continued

(Excludes inmates of institutions, members of Armed Forces living in barracks, college students in dormitories, and unrelated individuals under 14 years. Data based on sample, see text. For minimum base for derived figures (percent, median, etc.) and meaning of symbols, see text)

The State Urban and Rural Standard Metropolitan Statistical Areas of 250,000 or More Central Cities	Total	Below poverty level: Number	Below poverty level: Percent of total	Ratio of family (or unrelated individual) income to poverty level: Under .50	.50 to .74	.75 to .99	1.00 to 1.24	1.25 to 1.49	1.50 to 1.99	2.00 to 2.99	3.00 and over
THE STATE — Continued											
White											
All Persons in Families											
All family members	14 125 689	1 000 618	7.1	286 288	337 297	377 086	496 117	369 437	1 046 011	2 468 367	2 119
Under 25 years	6 297 373	551 203	8.8	216 219	127 613	207 371	264 398	207 587	707 798	1 773 480	2 907
25 to 44 years	3 436 365	189 203	5.5	77 573	42 196	69 534	101 175	125 237	348 852	910 713	1 751
45 to 64 years	3 189 734	125 990	3.9	48 992	32 488	43 557	56 781	64 771	169 498	542 561	2 752
65 years and over	1 224 137	136 119	11.1	42 597	34 920	56 594	75 763	71 842	137 871	226 593	565
Family heads	4 869 133	305 413	7.0	112 006	66 175	105 214	133 998	140 250	285 598	588 017	2 360
Under 25 years	1 202 479	77 599	14.0	12 196	6 021	8 972	10 882	9 921	22 267	48 719	79
25 to 44 years	1 602 160	115 973	7.2	49 087	25 104	41 782	54 205	63 378	172 237	437 789	756
45 to 64 years	1 654 496	85 878	5.2	27 704	16 099	29 485	39 277	53 993	89 066	88 698	1 167
65 years and over	614 038	75 573	12.3	23 447	20 151	31 975	29 634	33 058	78 163	112 839	378
Other family members	10 063 474	717 395	7.1	204 286	269 494	293 799	382 167	244 887	1 080 481	2 373 330	4 896
Under 6 years	1 496 420	160 116	10.7	62 948	36 815	60 341	75 716	45 659	221 224	477 961	476
6 to 13 years	2 209 240	225 899	9.9	88 075	51 378	86 446	109 724	72 492	326 093	692 394	807
14 to 17 years	1 116 338	82 769	7.4	32 336	19 280	31 113	43 084	29 205	123 623	294 670	525
18 to 21 years	740 221	37 945	5.1	14 372	9 368	14 203	18 410	22 690	61 958	178 103	428
22 to 24 years	449 675	16 485	3.7	4 238	3 951	6 296	9 282	11 618	39 613	89 833	290
25 to 44 years	1 026 197	73 320	6.0	28 406	17 092	27 722	46 878	61 059	176 615	472 924	994
45 to 64 years	1 525 284	60 112	3.9	22 490	11 861	21 922	26 554	25 770	79 626	253 881	1 022
65 years and over	650 099	60 546	9.9	19 150	14 777	26 619	25 227	23 786	67 709	123 754	389
Persons in Families With Male Head											
All family members	12 854 765	646 728	5.0	233 170	196 693	257 485	402 213	296 764	1 202 012	2 253 391	6 739
Under 25 years	5 673 176	306 815	5.4	188 707	73 087	124 301	206 397	166 018	723 028	1 679 289	2 492
25 to 44 years	3 179 477	127 155	4.0	54 298	28 536	48 411	84 646	112 371	327 034	871 486	1 656
45 to 64 years	2 943 175	98 086	3.3	28 491	25 384	34 009	44 526	54 892	150 029	496 946	2 098
65 years and over	1 058 937	115 482	10.9	25 772	28 946	50 764	66 644	63 483	122 922	305 670	484
Family heads	3 628 836	184 366	5.1	68 479	48 898	78 013	104 588	98 435	216 388	512 921	2 096
Under 25 years	177 662	15 670	8.8	6 438	4 133	5 125	7 975	6 763	21 625	48 325	77
25 to 44 years	1 451 499	68 172	4.7	24 182	13 314	22 736	40 510	53 570	157 094	414 086	726
45 to 64 years	1 481 627	44 888	3.0	10 445	11 896	15 367	28 510	26 438	75 260	255 587	1 058
65 years and over	537 251	63 630	12.1	19 502	16 553	27 575	33 664	62 521	98 083	233	233
Other family members	9 226 731	462 370	5.0	164 699	130 999	186 672	297 625	224 329	1 006 712	2 439 470	6 643
Under 6 years	1 374 982	88 556	6.4	31 885	21 117	36 434	61 225	78 492	211 554	466 554	468
6 to 13 years	2 064 908	118 230	5.7	41 246	27 540	49 578	85 908	111 817	301 996	662 976	784
14 to 17 years	993 639	45 097	4.5	16 180	10 674	18 265	29 282	28 957	107 284	270 518	500
18 to 21 years	656 541	25 004	3.8	8 140	6 353	9 933	15 172	19 673	52 363	150 767	393
22 to 24 years	407 562	13 246	3.3	4 958	3 182	5 198	8 040	10 116	28 244	82 169	265
25 to 44 years	1 727 978	66 982	3.9	26 106	15 272	25 655	44 134	58 793	169 940	457 488	970
45 to 64 years	1 461 553	53 198	3.6	20 046	14 510	19 642	34 016	38 462	76 789	261 359	1 029
65 years and over	539 686	51 852	9.6	16 270	12 393	23 189	31 089	39 819	60 401	107 667	250
Persons in Families With Female Head											
All family members	1 377 844	355 077	27.0	103 306	91 188	101 331	92 588	72 673	120 998	188 976	624
Under 25 years	619 197	245 188	39.6	107 512	56 686	83 070	58 581	41 569	84 780	115
25 to 44 years	248 888	62 148	25.2	27 360	13 660	21 123	14 531	12 886	31 818	38 727	94
45 to 64 years	246 559	27 690	11.2	11 302	6 980	9 128	16 255	9 875	19 553	35 635	133
65 years and over	165 200	20 037	12.1	6 825	5 982	7 830	9 117	8 359	14 949	20 923	81
Family heads	431 101	101 045	23.4	43 545	17 277	27 201	29 410	41 913	69 210	76 116	166
Under 25 years	27 817	12 311	34.0	5 788	2 888	3 857	2 911	1 158	1 863	2 104	7
25 to 44 years	148 669	55 881	37.5	24 985	11 790	19 036	13 295	9 888	15 140	23 783	30
45 to 64 years	172 930	30 998	17.9	8 868	3 486	4 118	7 212	7 523	14 684	33 183	88
65 years and over	86 787	11 943	13.8	3 945	3 113	4 188	5 992	4 384	7 641	14 838	42
Other family members	946 743	254 032	26.8	59 761	73 911	74 130	63 178	30 760	51 788	112 860	458
Under 6 years	121 438	71 560	58.9	31 935	15 698	23 236	13 491	7 167	9 728	11 487	7
6 to 13 years	224 340	107 329	47.9	40 829	23 102	34 868	18 477	10 697	14 697	11 487	23
14 to 17 years	124 709	37 672	30.2	14 718	8 886	13 148	10 348	5 998	14 698	23 932	25
18 to 21 years	82 780	12 877	15.6	5 466	3 913	4 488	4 441	3 017	8 993	19 326	32
22 to 24 years	42 113	3 230	7.7	1 288	769	1 198	1 233	1 582	3 369	7 484	21
25 to 44 years	98 219	6 347	6.5	2 288	1 870	2 897	2 728	3 066	6 675	15 668	63
45 to 64 years	72 731	6 916	9.4	2 653	1 881	3 284	2 346	2 057	12 532	44	37
65 years and over	79 413	8 894	11.1	2 888	2 384	3 438	4 158	3 960	7 388	14 887	30
Unrelated Individuals											
All unrelated individuals	1 420 915	440 090	30.8	184 088	122 483	113 546	93 625	72 904	120 268	26 472	37
14 to 24 years	183 358	85 352	46.5	37 193	17 406	19 673	15 636	7 342	15 685	3	83
25 to 44 years	388 681	51 241	13.2	23 369	8 341	7 710	10 612	8 117	15 052	26 472	37
45 to 64 years	431 952	83 688	19.4	41 847	21 315	20 434	25 329	26 112	44 168	161	84
65 years and over	416 924	221 809	44.1	81 684	75 389	76 729	41 048	31 330	45 363	97	88
Male unrelated individuals	642 230	130 412	24.0	84 698	38 893	38 613	33 881	23 281	41 880	7	19
14 to 24 years	85 367	41 074	48.1	25 942	9 788	6 838	3 889	2 972	7 338	11	15
25 to 44 years	168 975	17 165	10.2	8 899	3 888	3 888	3 973	3 973	9 971	24	37
45 to 64 years	150 120	22 653	15.1	11 298	5 208	5 208	5 880	6 880	9 720	24	37
65 years and over	138 768	49 540	35.7	16 732	15 909	15 909	5 880	4 877	15 449	24	37
Female unrelated individuals	887 685	309 678	34.9	148 888	83 590	74 933	59 744	49 623	78 388	26 465	18
14 to 24 years	97 991	44 278	45.2	11 251	7 618	12 835	11 747	4 370	8 347	3	68
25 to 44 years	131 699	22 375	17.0	13 430	4 453	3 822	6 639	4 144	5 081	2 448	18
45 to 64 years	271 832	60 953	22.4	30 549	16 106	14 926	19 449	19 588	34 448	137	66
65 years and over	386 163	171 972	44.5	93 658	55 413	43 350	21 909	21 521	30 512	77	66

than once, information was obtained on the reason for termination of the first marriage. Persons shown as "known to have been widowed" include widowed persons and those currently married or divorced persons whose first marriage ended in widowhood. Persons shown as "known to have been divorced" include divorced persons and those currently married or widowed persons whose first marriage did not end in widowhood.

HOUSEHOLD, RELATIONSHIP TO HOUSEHOLD HEAD, AND GROUP QUARTERS

The data on household relationship and group quarters were derived from answers to question 2 and from information about the type of living quarters (see facsimiles of questionnaire item and instructions, page App-37).

The question on household relationship was asked of all persons. The item on type of unit was filled by the enumerator or in the census office for each household.

Household.—A household includes all the persons who occupy a group of rooms or a single room which constitutes a housing unit. A group of rooms or single room is regarded as a housing unit when it is occupied as separate living quarters, that is, when the occupants do not live and eat with any other persons in the structure, and when there is either (1) direct access from the outside of the building or through a common hall or (2) complete kitchen facilities for the exclusive use of the occupants of the household.

The average population per household is obtained by dividing the population in households by the number of household heads.

Relationship to head of household.—Detailed categories of relationship to head of household are recognized in this report.

1. *Head of household.*—One person in each household is designated as the "head", that is, the person who is regarded as the head by the members of the household. However, if a married woman living with her husband was reported as the head, her husband was considered the head for the purpose of simplifying the tabulations.

   Two types of household head are distinguished—the head of a family and a primary individual. A family head is a household head living with one or more persons related to him by blood, marriage, or adoption. A primary individual is a household head living alone or with nonrelatives only.

2. *Wife of head.*—A woman married to and living with a household head, including women in common-law marriages as well as women in formal marriages. The number of women in this category may not always be the same as the number of "husband-wife households" and the number of "husband-wife families," because of differences in the weighting of the sample data.

3. *Child of head.*—A son, daughter, stepchild, or adopted child of the head of the household of which he is a member, regardless of the child's age or marital status. The category excludes sons-in-law and daughters-in-law. (See definition of "own child" below.)

4. *Grandchild of head*

5. *Parent of head or wife*

6. *Son- or daughter-in-law of head*

7. *Brother or sister of head or wife*

8. *Other relative of head.*—Any person related to the household head by blood, marriage, or adoption, who is not included in one of the specific relationship categories shown in the particular table.

9. *Secondary individuals in households.*—The categories "lodger (or partner)" and "resident employee" are shown separately.

Group quarters.—All persons not living in households are classified by the Bureau of the Census as living in group quarters. Persons living in group quarters are classified in this report as to type of group quarters. Institutions constitute a subcategory of group quarters and persons under care or custody in institutions are classified as "inmates."

Inmates.—Persons under care or custody at the time of enumeration in homes, schools, hospitals, or wards for juveniles, the physically handicapped or the mentally handicapped; in homes or hospitals for mental, tuberculosis or other chronic disease patients; in homes for unwed mothers; homes for the aged and dependent, including nursing, convalescent, and rest homes; and in correctional institutions are enumerated as "patient or inmate" of an institution—regardless of their length of stay in that place and regardless of the number of people in the particular place. Inmates of selected types of institutions are shown separately in this report.

Resident of other group quarters.—This category includes all persons living in group quarters other than institutions. A living quarters is called a group quarters if there are five or more persons unrelated to the head; or, when no head is designated, if six or more unrelated persons share the unit. Rooming and boarding houses, communes, workers' dormitories, and convents or monasteries fall into this category. Persons residing in certain other types of living arrangements are classified as living in group quarters regardless of the number or relationship of people in the unit. These include persons residing in military barracks, on ships, in college dormitories, or in sorority and fraternity houses; patients in short-term medical and surgical wards of hospitals who have no usual residence elsewhere; staff members in institutional quarters; and persons enumerated in missions, flophouses, Salvation Army shelters, railroad stations, etc. Selected types of group quarters are shown separately in this report.

Comparability with earlier census data.—The 1970 definition of a household differs from that used in the 1960 census only in the change in the definition of housing unit to require "complete kitchen facilities" now, as compared with "cooking equipment" previously. The definitions for 1970 group quarters are basically the same as those for 1960 but are more specific.

FAMILY AND UNRELATED INDIVIDUAL

Family and subfamily.—According to 1970 census definitions, a family consists of a household head and one or more other persons living in the same household who are related to the head by blood, marriage, or adoption; all persons in a household who are related to the head are regarded as members of his (her) family. A "husband-wife family" is a family in which the head and his wife are enumerated as members of the same household. Not all households contain families, because a household may be composed of a group of unrelated persons or one person living alone. The mean size of family is derived by dividing the number of persons in families by the total number of families.

A subfamily is a married couple with or without children, or one parent with one or more single children under 18 years old, living in a household and related to, but not including, the head of the household or his wife. The most common example of a subfamily is a young married couple sharing the home of the husband's or wife's parents. Members of a subfamily are also included among the members of a family. The number of subfamilies, therefore, is not included in the number of families.

A "family" has the same meaning in the 1970 census as a "primary family" in the 1960 census. Secondary families were defined in the 1960 census as groups of persons related to each other but unrelated to the household head, such as lodgers, friends, partners, or resident employees. However, the number of such families became so small (95,000 in 1969, according to the Current Population Survey) that the Bureau of the Census decided to include persons in these families in the count of secondary individuals for 1970.

Own child and related child.—Statistics on the presence of "own" children are shown in this report for families, subfamilies, and women of childbearing age. An own child is defined in the 1970 census, as in 1960, as a single (never married) son, daughter, stepchild, or adopted child under 18 years old of a family or subfamily head. The number of own children under 5 years old shown for women of childbearing age is limited to those living with mothers who have ever been married, whereas the number of own children in families or subfamilies includes those living with parents who have never married. Certain tables show the number of "related children" under 18 years old in the family. This includes not only "own" children, as defined above, but also all other family members, regardless of marital status, who are under 18 years old (except the head or wife). The mean number of related children under 18 in table 214 is derived by dividing the number of children under 18 in families by the number of families having children of that age.

Unrelated individual.—An unrelated individual is a member of a household who is not related to anyone else in the household, or a person living in group quarters who is not an inmate of an institution. Unrelated individuals who are not household heads are called "secondary individuals." Persons who are related to each other but not related to the head of the household (e.g., a family of lodgers or an employee and his wife) are classified as "secondary individuals." In the tables on income statistics, unrelated individuals are limited to those 14 years of age or older. In the statistics on poverty status of unrelated individuals, college students living in dormitories and members of the Armed Forces living in barracks are excluded.

Affidavit of Garry W. Bickel in Support of Motion.

[SAME TITLE]

1. I am a Research Associate employed by the Bureau of Social Science Research, Inc., a private corporation located in Washington, D.C. I hold a Ph.D in Economics.

2. The Bureau of Social Science Research was founded approximately 23 years ago by the present director, Robert T. Bower.

3. The function of the BSSR is to conduct research in the social science area and to contribute to the advancement of social science theory and methodology. Approximately 80 per cent of the work is survey research. The Bureau is supported by government contracts and through private foundation grants.

4. In my capacity as a Research Associate at the Bureau of Social Science Research, I recently obtained U.S. Census data from the Bureau of Census report titled *Metropolitan Housing Characteristics* (HC(2)Series, #149) describing housing conditions.

5. My research documents the relationship of a household's level of income with the probability it lives in a crowded dwelling unit.

6. The Census data, however does not provide the detailed, three-way cross-tabulation of households by level of household income, size of household, and size of housing unit, which would optionally display this relationship.

Relevant data is instead taken from tables keyed to the rental costs of housing units.

This is possible because these tables correlate rental price levels with data on the number of persons per room and on the median household incomes. Because these median incomes rise substantially with each level of rent

paid, irrespective of family size, these rent levels can be safely used to represent the effect of rising income levels.

7. These Census data tables are appended to this affidavit.

8. The results of these computations are shown on the attached Table 1.

9. The first row of the table is for rental units costing less than $80 in 1970 (irrespective of size). A very large proportion of these cheapest units were occupied by single persons (45%); the median size of households occupying such units was only 1.7 persons. Thus the crowding factor is largely obscured for this group of renter households, since we are not able to measure it for different sized families separately, even though the average income of the group is quite low. By the definitions of "crowded" and "very crowded" living conditions adopted here (more than one person per room, and more than 1.5 persons per room, respectively) a single-person household cannot be "crowded," no matter how cramped the living space involved may be.

10. The remainder of the table shows clearly the strong relationship that exists between relative prevalence of crowding and average level of household income. As household incomes go up, the proportion of households living in "crowded" or in "very crowded" conditions goes down. Comparing the lowest- to highest-income groups represented here, the likelihood of being "crowded" is more than three times as great for the lower-income households, and the likelihood of being "very crowded" nearly four times as great.[1]

[1] These relative measures would be greater still if single-person households could be separated from the grouped data, since they are proportionately much more numerous—and tending to mask the crowding effect as here defined—in the lower-income household groups here represented.

Affidavit of Garry W. Bickel.

11. Finally, the attached graph illustrates the extremely close statistical relationship that exists between the prevalence of residential crowding and the average level of household income, as it shows up in these data for the New York City metropolitan area. If the relative prevalence of crowding is regarded as the "dependent" variable, to be "explained" by the median level of household income, as the "independent" variable, for groups of renter households, it appears that the explanation is nearly perfect. That is, the statistically fitted curve is nearly a perfect fit or, alternatively, the correlation observed between the two variables is nearly a perfect correlation.

12. It can thus be asserted with great confidence that the degree or prevalence of residential crowding occurring among renter households in the New York City metropolitan area depends very strongly on the level of income available to the household. For the particular arrangement of household groups observed here, the level of income alone is substantially more important than all other possible determining factors combined. This would probably hold true for more detailed groupings of households as well.

(Sworn to by Gary W. Bickel, July 10, 1974.)

Table, Exhibit "A" to Bickel Affidavit.

TABLE 1

COMPARISON OF INCOME LEVEL AND "CROWDING" FOR RENTER HOUSEHOLDS IN THE NEW YORK CITY SMSA, BY RENTAL LEVEL, 1970

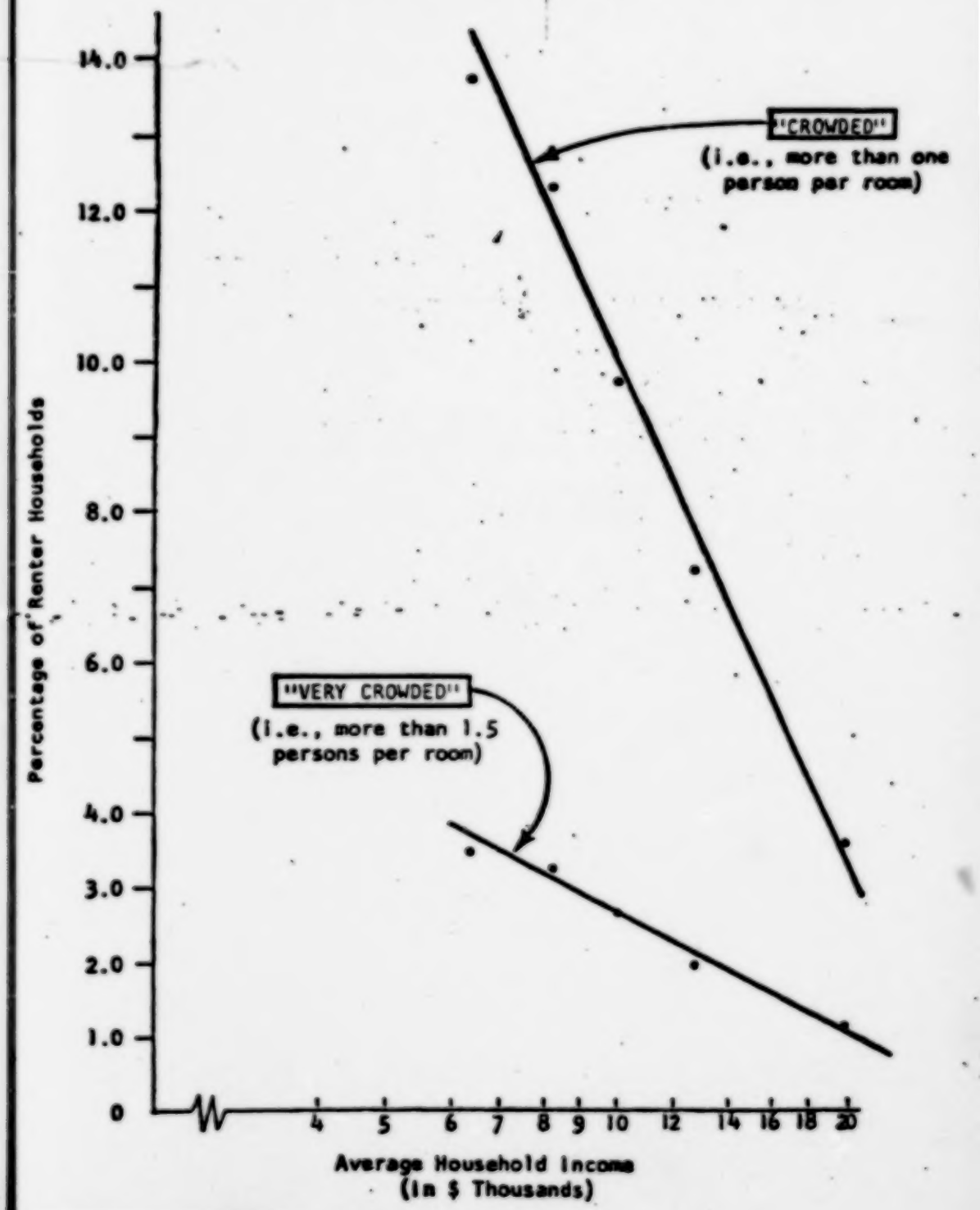
Rental Level ($ per month)	Number of Renter Households (In thousands)	Percentage of Rental Units "Very Crowded" (more than 1.5 persons/room)	Percentage of Rental Units "Crowded" (more than one person/room)	Median Household Income	Median Household Size (no. of persons)	Income Per Member of Household Median (4) ÷ (5)
	(1)	(2)	(3)	(4)	(5)	(6)
Primarily Single-Person Households:						
Below $80	456	2.8%	9.3%	$ 4,300	1.7	$2,529
Primarily Multi-Person Households:						
$ 80-119	877	3.4%	13.6%	$ 6,400	2.3	$2,783
120-149	383	3.2	12.2	8,200	2.3	3,565
150-199	395	2.6	9.6	10,000	2.3	4,348
200-299	214	1.9	7.1	12,600	2.3	5,478
300 and over	75	1.1	3.5	19,800	2.2	9,000

Source: U.S. Bureau of the Census, 1970 Census of Housing: *Metropolitan Housing Characteristics, New York, N.Y. SMSA* (Census Series HC(2) number 149), Table A-2: "Gross Rent of Renter-Occupied Housing Units."

Table, Exhibit "B" to Bickel Affidavit.

(See opposite page ☞)

PERCENTAGE OF RENTAL UNITS "CROWDED" AND "VERY CROWDED" IN THE NEW YORK CITY SMSA, BY MEDIAN LEVEL OF HOUSEHOLD INCOMES AT DIFFERENT RENTAL COST LEVELS, 1970



Source: accompanying table.

Metropolitan Housing Characteristics—New York, N. Y., 1970 Census, Exhibit "C" to Bickel Affidavit.

(See opposite ☞)

Table A–2. Gross Rent of Renter Occupied Housing Units: 1970

(Data based on sample. See text. For maximum base for derived figures (percent, median, etc.) and meaning of symbols, see text)

The SMSA	Total	Less than $50	$50 to $59	$60 to $69	$70 to $79	$80 to $99	$100 to $119	$120 to $149	$150 to $199	$200 to $299	$300 or more	No cash rent	Median (dollars)
Specified renter occupied[1]	2 686 344	69 756	69 788	120 421	109 336	482 891	893 797	302 940	395 001	214 091	75 253	66 069	113
ROOMS													
1 room	130 788	10 289	6 979	11 805	9 786	21 155	17 512	21 770	19 670	9 079	1 676	1 618	106
2 rooms	232 874	8 666	10 042	17 221	21 257	42 354	31 562	36 801	33 972	22 683	4 290	2 500	110
3 rooms	804 685	16 967	24 414	49 372	75 035	177 161	129 144	123 941	127 822	53 738	18 213	8 918	109
4 rooms	738 869	10 930	20 951	41 753	62 248	155 922	126 668	106 397	115 667	63 998	20 978	13 351	111
5 rooms	349 651	2 485	5 740	13 610	24 460	85 499	84 882	62 376	56 068	33 006	13 880	7 845	118
6 rooms	139 956	558	1 413	3 280	5 775	17 562	20 068	25 316	29 957	22 311	8 748	5 018	142
7 rooms	31 359	91	157	314	752	2 295	3 283	4 937	7 283	6 341	3 816	2 090	169
8 rooms or more	16 168	90	60	126	953	583	878	1 604	2 752	3 565	3 654	2 923	217
Median	3.4	3.9	3.2	3.3	3.6	3.5	3.6	3.6	3.6	3.8	4.1	4.2	...
PERSONS													
1 person	764 090	21 989	25 371	42 037	36 978	142 197	95 203	96 616	89 086	49 605	17 269	10 874	100
2 persons	748 227	18 645	19 695	39 565	34 548	141 867	91 497	116 789	134 747	71 521	27 797	12 025	117
3 persons	401 537	3 278	7 126	15 435	23 414	79 749	70 672	67 025	72 986	38 692	13 308	6 872	118
4 persons	298 752	3 837	3 838	10 251	19 961	58 993	54 823	50 559	52 159	30 101	10 131	6 695	119
5 persons	151 077	1 895	1 867	5 720	10 288	31 667	30 107	26 564	22 552	12 692	4 033	4 025	115
6 persons or more	140 534	973	4 908	6 453	9 227	26 534	30 035	25 591	23 471	11 910	2 717	3 773	117
Median	2.2	1.7	1.5	1.7	1.9	2.2	2.4	2.3	2.3	2.3	2.2	2.4	...
Units with roomers, boarders, or lodgers	58 036	1 019	1 554	3 021	3 679	10 239	8 827	8 625	9 510	7 406	3 168	985	121
PLUMBING FACILITIES BY PERSONS PER ROOM													
With all plumbing facilities	2 575 640	59 798	62 871	120 988	101 859	469 347	385 573	277 973	291 393	213 183	74 837	62 689	114
0.50 or less	961 987	24 998	36 698	67 654	89 830	183 948	130 673	129 919	133 738	83 506	27 627	19 638	108
0.51 to 1.00	1 171 476	32 998	21 656	47 869	79 296	223 680	198 483	201 867	220 142	114 508	34 589	12 191	119
1.01 to 1.50	195 738	1 540	3 244	8 230	13 782	45 271	42 910	33 965	27 749	11 042	1 779	4 237	110
1.51 or more	86 450	1 066	1 327	3 249	4 995	14 348	13 505	11 501	9 763	4 049	842	1 623	111
Lacking some or all plumbing facilities	88 789	9 964	6 831	10 649	7 469	18 274	8 226	5 678	3 609	1 416	418	1 378	79
0.50 or less	15 979	2 028	1 640	2 375	2 087	2 903	1 695	1 062	895	391	248	464	77
0.51 to 1.00	45 107	7 526	4 536	7 005	4 506	8 851	5 302	3 538	2 142	837	153	891	77
1.01 to 1.50	3 707	67	126	230	307	541	555	485	231	79	6	86	102
1.51 or more	4 988	389	309	829	569	979	684	564	341	109	11	134	85
BEDROOMS													
None	182 258	11 294	7 898	14 556	12 611	27 967	24 226	21 888	21 382	16 579	2 362	1 595	113
1	1 056 414	25 248	36 369	67 681	98 248	225 660	164 732	160 180	164 991	77 727	25 151	12 623	109
2	844 363	12 491	21 048	44 082	67 695	169 016	143 462	125 446	138 903	76 790	29 569	15 861	114
3 or more	361 224	2 463	4 740	13 498	20 068	60 182	62 079	62 723	62 580	42 448	19 415	13 031	126
YEAR STRUCTURE BUILT													
1969 to March 1970	20 694	233	250	556	895	1 468	1 358	1 748	4 719	6 437	2 800	232	189
1965 to 1968	163 802	1 095	1 255	2 604	3 709	5 699	4 486	10 702	30 180	29 942	12 759	1 371	186
1960 to 1964	208 681	1 236	1 648	5 915	7 361	12 750	11 162	22 211	67 107	55 600	21 169	2 702	180
1950 to 1959	300 187	5 248	3 947	7 510	15 456	37 411	34 409	46 933	84 916	45 086	14 210	5 061	148
1940 to 1949	307 376	4 337	5 278	10 344	18 862	58 080	54 814	63 919	61 022	21 236	4 830	4 654	120
1939 or earlier	1 583 664	37 605	57 324	110 564	153 073	367 113	287 568	237 429	147 057	56 420	19 467	30 044	101
ELEVATOR IN STRUCTURE													
4 floors or more	1 618 585	38 891	50 518	98 655	145 160	347 057	264 357	219 536	225 835	147 025	63 907	17 634	109
With elevator	1 019 881	15 551	15 354	36 011	63 411	166 873	151 414	160 769	201 426	138 428	62 033	8 611	131
Walk-up	598 704	23 340	35 164	62 644	81 749	180 184	112 943	58 767	24 409	8 607	1 874	9 023	90
1 to 3 floors	825 774	12 596	17 537	39 162	53 462	135 568	130 142	160 701	172 021	66 507	12 590	25 488	122
COMPLETE BATHROOMS													
1 and 1 1/2	2 199 244	31 753	53 858	114 926	180 390	452 296	373 361	363 834	372 613	181 296	36 226	36 695	113
2 or more	107 535	524	451	700	1 069	2 881	4 463	7 524	15 230	31 353	37 938	5 402	258
Share or also used by another household	137 628	16 837	15 955	21 788	18 372	27 675	15 627	10 447	5 809	2 175	670	2 273	77
INCOME IN 1969													
Less than $2 000	337 230	19 917	20 324	34 498	42 517	78 509	49 112	29 010	29 147	12 723	4 169	7 304	92
$2 000 to $2 999	168 192	7 081	9 236	16 200	21 222	43 588	27 851	19 906	13 583	4 784	1 321	3 120	92
$3 000 to $3 999	162 453	4 716	7 501	14 050	17 895	41 770	29 160	22 065	15 540	5 303	1 271	3 184	97
$4 000 to $4 999	157 394	3 907	6 393	13 199	17 690	38 361	28 281	22 379	16 343	6 277	1 351	3 213	99
$5 000 to $5 999	174 986	3 304	5 516	11 807	18 447	42 723	32 718	26 741	20 321	8 000	1 728	3 671	102
$6 000 to $6 999	170 664	2 449	4 258	10 197	16 514	41 322	31 256	27 413	23 260	8 943	1 859	3 183	106
$7 000 to $9 999	452 591	4 615	8 722	19 290	32 778	96 100	82 349	84 259	80 179	32 362	5 956	7 981	115
$10 000 to $14 999	458 198	2 486	5 437	12 629	22 310	70 716	75 219	87 286	109 182	54 810	10 573	7 540	133
$15 000 to $24 999	273 779	955	1 924	4 810	8 633	26 751	32 426	45 347	72 552	57 252	19 425	3 704	160
$25 000 or more	88 857	326	391	761	1 350	4 361	5 425	8 536	14 894	24 067	27 602	1 164	233
Median	$7 400	$2 700	$3 700	$4 300	$5 000	$5 900	$7 000	$8 200	$10 000	$12 600	$19 800	$6 500	...
YEAR MOVED INTO UNIT													
1969 to March 1970	450 025	5 757	6 619	14 324	20 862	66 581	65 749	75 734	99 699	64 991	23 322	8 387	137
1968	283 454	3 601	4 055	9 075	15 285	44 318	43 408	52 382	60 943	34 606	11 424	4 357	131
1967	226 952	2 826	3 654	7 834	13 389	40 108	37 516	42 635	44 612	23 319	7 933	3 126	125
1965 and 1966	366 056	5 635	7 391	16 611	27 333	72 784	63 613	62 398	60 938	32 440	11 026	4 871	116
1960 to 1964	469 254	8 406	10 585	22 896	37 309	95 351	78 025	70 982	69 401	35 091	13 315	7 893	112
1950 to 1959	366 905	10 558	15 166	27 372	40 271	87 846	61 817	50 718	40 751	18 074	5 800	8 532	100
1949 or earlier	301 763	12 331	22 794	39 300	45 382	76 860	43 323	28 956	17 308	6 301	2 004	7 304	86
GROSS RENT AS PERCENTAGE OF INCOME													
Less than 10 percent	296 371	13 117	16 137	27 422	36 244	71 701	49 487	35 711	24 726	13 134	6 694	...	95
10 to 14 percent	471 303	7 325	12 168	26 009	40 305	105 949	84 930	77 022	73 821	33 048	10 706	...	110
15 to 19 percent	467 226	4 998	7 940	18 332	29 100	76 570	67 367	73 279	78 720	39 143	11 771	...	120
20 to 24 percent	318 004	4 356	6 076	11 218	16 751	45 630	44 244	48 924	59 735	31 525	9 245	...	126
25 to 34 percent	309 652	6 682	7 529	14 093	19 584	51 656	46 407	50 960	61 945	38 639	12 051	...	125
35 percent or more	372 279	10 922	16 902	35 205	50 343	115 100	89 740	86 983	88 195	55 487	23 462	...	113
Not computed	111 507	2 354	2 630	5 052	7 029	15 709	11 622	10 057	7 859	3 545	1 386	44 804	101
AIR CONDITIONING													
Room unit(s)	748 873	3 331	5 676	14 401	25 507	80 969	92 097	132 969	200 867	136 399	61 422	15 235	133
Central system	57 921	147	96	222	434	1 046	1 422	2 250	7 252	20 157	24 029	866	378
None	1 629 613	65 636	64 492	122 789	173 890	400 837	299 932	248 586	185 533	60 266	9 383	20 269	108

[1] Excludes one-family homes on 10 acres or more.

Affidavit of John T. Hand in Support of Motion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF WESTCHESTER } ss.:

JOHN T. HAND, being duly sworn, deposes and says that:

1. Deponent is a member of the Bar of this Court; deponent resides at 4 Valley Trail, Croton-on-Hudson, New York. Deponent is the Director of the Civil Division and Westchester Legal Services Project of The Legal Aid Society of Westchester County (hereafter, the Society), which represents plaintiffs herein. Deponent makes this affidavit on behalf of plaintiffs' motion for summary judgment, and on personal knowledge of the facts and circumstances stated herein, except as to matters stated to be on information and belief and as to such matters he believes them to be true.

2. Deponent has been associated with the Society as an attorney since March, 1968, and, in his employment, has been a staff attorney in various branch offices and the Research & Appeals Bureau of the Society until his appointment as Director of the Civil Division in December, 1973.

3. Deponent is responsible for the operation of the Civil Division of the Society, including the operations of the Society's Divorce Unit. The Civil Division of the Society has handled divorce cases since at least the inception of the federally funded Westchester Legal Services Project in 1968 for eligible persons in Westchester County. Since

September 1969, divorce matters have been handled by a centralized divorce unit with but one staff attorney. The staff attorney is assisted by secretarial and paralegal assistants and by a fluctuating but small number of volunteer lawyers. Deponent is informed by Marsha Greenfield, Esq., attorney-in-charge of the Divorce Unit that at the present time, she is helped by one part-time volunteer attorney and a full-time summer law student-clerk.

4. In February, 1974, deponent directed that new cases in the Divorce Unit be limited to very few due to the large backlog of cases which had accumulated up to that time, to wit: in excess of 400 open files. Some of these files, however, contained applications by persons since determined to be ineligible for legal services.

5. Recently, due to the uncertainties of continued federal funding of our legal services project and due to continued backlog of over 200 apparently eligible open cases, deponent directed that no additional cases be accepted by the Divorce Unit. A copy of a form letter dated June 15, 1974, which is given to applicants to the Divorce Unit, is annexed hereto marked Exhibit "A".

6. The Divorce Unit presently has a waiting list, and deponent is informed by Marsha Greenfield, Esq., that at the present time there are approximately 105 names thereon. It should be noted, however, that since no interviews have been conducted with persons on the waiting list, no representation can be made as to such persons' eligibility for legal services.

7. Deponent can represent to this Court without any doubt that there are many persons in Westchester County eligible for legal services who desire divorces who are not presently being served by the Society.

(Sworn to by John T. Hand, June 24, 1974.)

Letter From John T. Hand to Applicants to Legal Aid Divorce Unit, Exhibit "A" to Hand Affidavit.

THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY
56 Grand Street
White Plains, New York 10601

(914) RO. 1-9200

June 15, 1974

Dear Madam (Sir)

Due to the uncertainties of continued funding and present workload, we are unable to handle your request for legal services at this time.

We will be happy to retain your name and address so that if we are in a position to assist you in the future, we will contact you. However, it is important that you understand that you are not to rely on our help to give you such services unless and until we contact you.

Very truly yours,

JOHN T. HAND
John H. Hand
Director of Civil Division

JTH:fb

Affidavit of Linda Harmon in Support of the Constitutionality of 18 NYCRR § 352.30(d).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 3423 A.B.

ROSE HURLEY, et al.,

Plaintiffs,

against

BARRY VAN LARE, et al.,

Defendants.

STATE OF NEW YORK }
COUNTY OF ALBANY } ss.:

LINDA HARMON, being duly sworn, says and deposes:

1. I am a Senior Program Specialist for the New York State Department of Social Services—Bureau of Program Development. I have a Bachelor of Science Degree in Home Economics from the State University College in Buffalo and have 20 hours towards my Master in Home Economics. I have been employed by the State Department of Social Services for four years and previously was employed by the Erie County Department of Social Services for five and one half years.

2. In my official capacity I have had experience and acquaintance with the establishment and operation of program policies and standards for the New York State Department of Social Services (hereinafter "the Department").

3. Under present New York State Law and Regulation maximum allowances for shelter (except, in certain cases, for fuel) for public assistance recipients are established by local social service officials. Shelter allowances are granted as paid up to the agency maximum; shelter allowances may exceed the agency maximum when exceptions are granted by the local officials. The rent schedules in effect in all 58 local districts have been submitted to the court. To the knowledge of the Department only two actions have ever been brought against local districts challenging the adequacy of rental schedules, one resulting in judgment in favor of the local district (*Bronson* v. *Barbaro,* Supreme Court, Nassau County), the other was withdrawn upon the local agency's adoption of a revised shelter schedule. The Department believes that its current shelter policy makes sufficient funds available to public assistance recipients for them to obtain adequate housing to the extent that it is available. To the extent some public assistance recipients reside in inadequate housing, the solution does not lie in merely raising the maximum amount of shelter allowances. In this regard it is noted that the over 93% of public assistance recipients have a shelter allowance that meets their full shelter costs. It is further noted that a local agency's maximum rent schedule is known by many local landlords some of whom make it a practice to raise rents to the amount of the maximum. Such a practice has a multitude of nefarious effects including increased expenditure of public funds without any benefits to welfare recipients and the raising of rents for lower income families who are not on public assistance thus causing segregation of public assistance recipients in buildings and neighborhoods inhabited almost totally by persons receiving public assistance.

4. It has long been recognized that persons living together experience a reduction in per capita living costs.

This has been borne out in studies done by agencies of the federal government which collect such data (Bureau of Census, *Current Population Reports;* Bureau of Labor Standards, *Consumer Pricing Index*) and, with particular regard to shelter, by studies made by this Department and the New York City Department of Social Services submitted herewith. The economy of scale is attributable to all persons in the household unit equally. The amount of public assistance monies allowable for shelter are specifically identifiable and the pro-ration of the shelter allowance accurately reflects the percentage of people residing in the home who are entitled to have their shelter needs met. Accordingly, Commissioner Lavine and the Department fulfill their statutory obligations to determine need and render asistance only to those people entitled thereto.

5. Historically, another purpose of 18 NYCRR 352.30(d) is that of encouraging public assistance recipients to take in paying boarders and lodgers so as to reduce need for public assistance. The motivation for such policy is the desire to conserve public funds. In addition, the policy encourages the recipient to engage in an income producing activity in the hope they will ultimately remove themselves from the public assistance rolls or reduce their dependence on public assistance (See Department Bulletin 134(d), attached hereto, interpreting Department Regulation 352.30(d) formerly 352.3). Accordingly, so long as recipients do not create overcrowded conditions endangering health and safety or causing neglect of children, they are allowed and encouraged to take in paying boarders and lodgers. The exemption of $15.00 monthly income from lodgers, and up to $60.00 monthly for boarders, is simultaneously a result of the state's desire to encourage the taking in of paying boarders and lodgers and a recognition that a cognizable expense may result from this income-

producing activity. When the person residing in the public assistance household does not contribute even the $15.00 minimum payment for lodging, the policy, as stated above in paragraph 4, is to pro-rate the amount the public assistance unit receives for shelter so as to correspond to that unit's utilization of the premises.

6. Certain changes in policies relating to rent are being considered by the Department. Most notably, there is the proposed state mandated schedule of rent ceilings which presently appears in NYCRR 352.3(a). It is presently planned that this schedule will become effective state-wide on January 1, 1975. (Fourteen counties have adopted the schedule as their locally established schedule under 352.3(a) as presently in force). It should be noted that Regulation 352.30(d) remains in effect.

(Sworn to by Linda Harmon, June 25, 1974.)

Affidavit of Marvin Rachlin in Support of the Constitutionality of 18 NYCRR § 352.30(d).

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Index No. 73C 699

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Plaintiffs,

against

ABE LAVINE, individually, and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Defendants.

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

MARVIN RACHLIN, being duly sworn, deposes and says:

That he is an attorney duly licensed to practice law in the state of New York, and is Executive Assistant to the Defendant Commissioner of the Nassau County Department of Social Services, and has held that position since 1966.

That your deponent's function is that of House Counsel and he is fully familiar with the instant litigation as well as other litigation, legislation, rules and regulations affect-

ing the administration of public assistance programs in the County of Nassau and State of New York.

The plaintiffs, challenging the validity of 18 NYCRR 352.30(d) have concluded that the subject regulation, that proportionately limits a shelter allowance to the extent that shelter is shared with non-recipients, is presumption of income in contravention of 45 CFR 233.90(a) as well as the supremacy clause of Article VI, and due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

The facts and allegations in the original complaint regarding the named plaintiffs, Annie Taylor and Charlotte Otey, do not support the conclusions drawn by plaintiffs and provide no legal basis for the relief requested.

As originally alleged in the complaint, the plaintiff, Annie Taylor, resided in an apartment with her infant daughter and her adult sister, all of whom were in receipt of public assistance from Nassau County. The plaintiff and her daughter received a shelter allowance of $110.00 per month, representing two-thirds of the County's shelter allowance for three persons, and her sister received $55.00 per month, representing one-third of the shelter allowance of $165.00 per month as part of her independent assistance grant.

The payments continued until January, 1973 when the grant to plaintiff's sister was discontinued for failure to comply with eligibility requirements. The grant to the plaintiff and her child was not reduced or altered in any manner.

The plaintiff did, however, seek an increase in her own grant. The attempt was to increase one grant to offset the discontinuance of another's grant, although no legal objection was ever raised as to the original termination. As of March 1973, plaintiff's sister did comply with the eligibility requirements, was reopened and did again receive her grant, including her $55.00 shelter allowance.

The refusal to increase the plaintiff's grant was not based upon nor had it any relevance or relationship to a presumption of income. The refusal was based upon the fact that the plaintiff could gain no greater eligibility solely by virtue of another person's ineligibility even if the other person resided in the same household. The willful failure of plaintiff's sister to pay rent to the plaintiff creates no constitutional grounds for redress against the taxpayers of the County of Nassau and State of New York. There is no question that the refusal of the sister was willful in that a shelter allowance from public assistance funds was paid to her previously, was terminated for failing to provide eligibility information available to her, and was restored when she provided the necessary information two months later.

That the plaintiff Charlotte Otey alleges and admits at paragraphs 27 and 28 of the sworn complaint, that she arranged with her adult son for his financial contribution to the household if he remained. It is further alleged that "in view of the likelihood of this change in circumstances * * *" (par. 28, verified complaint), the plaintiff Otey failed and refused to challenge the proposed reduction or even appear at the fair hearing which was scheduled at her request. The shelter allowance was reduced only after the willful default by the plaintiff Charlotte Otey.

That by virtue of the fact that the plaintiff's adult son failed or refused to perform the commitment agreed to with his mother, the plaintiff concludes that this failure must be paid for with public funds and that the uncontested refusal to do this violates federal law.

That the real issue in the Otey situation as in the Taylor case is whether or not valid eligibility requirements can be bypassed through the payment of a substitute grant to an eligibile receipient in lieu of a grant to one who is not eligible.

That the plaintiff Otey's adult son would have been eligible for assistance in his own name, provided he complied with the employment requirements of New York State Law (Sec. 131, subd. 4).

Plaintiff's son, therefore, could have obtained the funds to pay for his share of shelter from employment income or public assistance or both. His refusal and failure to do so creates no entitlement for his mother, nor any liability on the part of the public at large.

That your deponent does not believe that it was the intent of Congress to have the Federal AFDC program provide benefits for those not eligible or to become the authority for eluding valid requirements of other federal or state assistance programs, which would be the effect of granting the relief demanded by the plaintiffs Taylor and Otey and all others similarly situated.

That by virtue of the low vacancy ratio of available housing in Nassau County, the relief demanded by the plaintiffs would work primarily to the benefit of the landlords; would ultimately diminish the plaintiff's ability to obtain adequate housing; and would increase the cost to the taxpayer, all of which would be adverse to the public interest.

That there is virtually no rent control existing in the County of Nassau. The rent schedule, and, therefore, the rents paid by the Nassau County Department of Social Services, are in fact the only rent control or stabilization existent in the County. If the Department of Social Services is forced to abandon 18 NYCRR 352.30(d), then it must be expected in our housing market that tenants will be required to "double up" as a condition of tenancy, with each family or individual responsible for the full rent that was previously charged for the entire unit. The funds to the landlords will multiply, as will the cost to the taxpayer in the same proportion that the available space to any recipient tenant is diminished.

That the responses to changes in the rent structure of the Department of Social Services by the landlords are swift and effective. Prior to July 1970, in reviewing the rent schedule, the Nassau County Department of Social Services conducted a survey and determined that 17.6% of the caseload was paying rent in excess of the schedule. That immediately following the adoption of a new and higher schedule on July 1, 1970, the survey revealed 18% of the caseload paying rent in excess of the new and higher schedule. Higher rents do nothing to increase the number of dwelling units available, but rather only increase the cost of those units already in use. The effect of increasing the amount of money available from public assistance funds for rent will be to simply inflate the rents to that level, which will ultimately result in pricing the middle income wage-earner out of the market and out of the community. When only those dependent upon public funds can afford the rent in a community, that community cannot long survive.

That granting a rent allowance without regard to the composition of the household, would create an undue advantage for landlords in an already unbalanced relationship and would work against the efforts being made and accomplishments being achieved in upgrading the housing conditions for public assistance recipients in Nassau County.

That the Nassau County Department of Social Services, in cooperation with the County Housing Coordinator, the United States Department of Housing and Urban Development, the County Health Department, and the various building departments of the municipalities within the County, has inspected 5,873 dwelling units since February 29, 1973, to determine the existence of violations which would make the units substandard pursuant to Sec. 143-b of the Social Services Law of the State of New York. The

program has resulted in repairs and improvements of many units. Of the 5,873 units inspected, only 59 have been determined to be substandard, and 385 corrections and improvements were made, with 351 additional corrections pending.

That the inspection program has forced repair and maintenance of public assistance supported housing in the County of Nassau. To adopt a posture that would permit or require the sharing and "doubling up" of basic living accommodations would certainly result in eliminating the advantage that has been gained; strengthening the position of the landlord in relationship to his tenant; and increasing the cost to the taxpayer while providing no comparable benefit to any segment of our population to whom we owe a public duty.

That the due process and equal protection clauses of the Fourteenth Amendment to the Constitution do not mandate, provide for or protect any particular level of public assistance grant. 18 NYCRR 352.90(d) presumes nothing; not income, not relationships, and not standards of behaviour based upon any given standard of morality. The regulation is a rational limitation of public funds only to those and only to the extent that those eligible persons have a demonstrated need pursuant to the public assistance programs of the State of New York.

(Sworn to by Marvin Rachlin, June 24, 1974.)

Transcript of Hearing on June 26, 1974 (Excerpts).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 3423

ROSE HURLEY, individually and on behalf of her minor dependent children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Plaintiffs,

against

BARRY VAN LARE, individually, and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York,

ABE LAVINE, individually, and in his capacity as Commissioner of the Department of Social Services of the State of New York,

LOUIS P. KURTIS, individually, and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Defendants.

EASTERN DISTRICT OF NEW YORK

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73 Civ. 699

ANNIE TAYLOR, et al.

v.

ABE LAVINE, et al.

New York, New York
June 26, 1974

Before

HON. PAUL R. HAYS, Circuit Judge
HON. JACK WEINSTEIN, District Judge
HON. ARNOLD BAUMAN, District Judge

(2)[*] Appearances

LEGAL AID SOCIETY OF WESTCHESTER COUNTY,
Attorney for Plaintiffs
By: MARTIN A. SCHWARTZ, Esq.
LAWRENCE S. KAHN, Esq., of Counsel
and
NASSAU COUNTY LAW SERVICES COMMITTEE, INC.,
By: LEONARD S. CLARK, Esq., of Counsel

LOUIS J. LEFKOWITZ, Esq.
Attorney General for the State of New York
(MRS.) JUDITH GORDON, Esq., Assistant Attorney General

GERALD HARRIS, Esq.
County Attorney, Westchester County
By: F. SHERWOOD ALEXANDER, Esq., of Counsel

BROOKLYN LEGAL SERVICES,
Attorneys for Proposed Intervenor, Aloise
By: YVONNE LEWIS, Esq., of Counsel

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(7) PHYLLIS M. D'ALESSIO, called as a witness, being first duly sworn, testified as follow:

Direct Examination by Mr. Schwartz:

Q. Mrs. D'Alessio, where do you reside? A. Forty Southwest Street, Mt. Vernon, New York.

Q. How long have you resided at that address? A. Almost three years.

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[*] Numbers in parentheses refer to pages of original transcript.

Q. How old are you, Mrs. D'Alessio? A. I will be 32.

Q. Do you presently work? A. No, I do not.

Q. When have you last worked, if you have at all? A. I don't quite remember. I believe it was 1967, 1968, something like that.

Q. And could you describe the type of work that you did? A. I was working in a nursing home.

Q. And what type of work did you do? A. Dietician's aide.

(8) Q. Who do you reside with? A. Harry Mattola, Christine and Kathy D'Alessio.

Judge Bauman: I wonder if you could speak up just a little bit louder, please.

Q. Are Kathy D'Alessio and Christine D'Alessio your daughters? A. Yes.

Q. Is Mr. Mattola a relative of yours? A. No.

Q. Is he the father of either of your children? A. No.

Q. Has he adopted either of your children? A. No.

Q. How long has Mr. Mattola resided with you? A. It's been off and on for the past seven or eight years.

Q. Does he presently reside with you? A. Yes.

Q. Does he reside with you permanently? A. Yes, he does.

Q. Are you married, Mrs. D'Alessio? A. I am separated with a divorce in proceeding.

Q. When was the last time you had seen your husband? A. Ten years ago.

(9) Q. Have you made any previous efforts to get a divorce? A. Yes, I have.

Q. When was that? A. That was November 5, 1966.

Q. And what efforts did you make, Mrs. D'Alessio? A. I applied for divorce in Legal Aid in Mt. Vernon, got transferred to White Plains, and when it reached for publication, a fee, I couldn't pay for it, and it was dropped.

Q. And what type of divorce proceeding is in progress now? A. My husband is filing suit.

Q. Has the suit been filed? A. As far as I know, it has.

Q. Are you and your children receiving public assistance? A. Yes, we are.

Q. And do you know what category you are receiving such assistance? A. Aid to dependent children.

Q. What is the total amount of your public assistance grant? A. $354.00.

Q. Does this include shelter? A. Yes.

(10) Q. How long have you been receiving public assistance? A. For about eight or nine years. About 9 years.

Q. How would you describe the present state of your health? A. Not good.

Q. Could you elaborate on that? A. Well, I have had several operations in the past seven years, two spinal operations. I had a cancer operation two years ago that was necessary for a hysterectomy. I have had about eight operations on my feet for fibrous tumors, and I have been hospitalized periodically for traction.

Q. Who took care of the children while you were in the hospital? A. Mr. Mattola.

Q. How about while you were recovering? A. Mr. Mattola.

Q. Who performed the household chores during these periods? Mr. Mattola.

Q. Could you describe the relationship between Mr. Mattola and your children? A. As far as the children are concerned, that is their father. He has been like a father to the children. He has raised them.

(11) Q. And do the children view him as the father? A. Indeed, yes.

Q. Could you describe the functions that Mr. Mattola performed while you were in the hospital and while you were recovering? A. He cooked for them, he shopped for

them, they were pre-school, he bathed them, cleaned the house, and took them out, kept their time occupied.

Q. How old is Mr. Mattola? A. Mr. Mattola will be 50.

Q. Does he work? A. He hasn't worked as of lately.

Q. When would be the last time that he has worked? A. About a year or two ago.

Q. What type of work does Mr. Mattola do? A. Caddy master to caddy.

Q. When he works, does he work continuously? A. Off and on. He does odd jobs in the winter time, and in the season he is an the golf course.

Q. Is Mr. Mattola himself a recipient of public assistance? A. No, he is not.

Q. Has he ever applied for public assistance? A. No, he never has.

(12) Q. How does he support himself? A. By doing these odd jobs and the golf course.

Q. Has he ever received unemployment compensation? A. Yes, he has.

Q. Does he receive it now? A. No, he does not.

Q. Does Mr. Mattola provide any support to either your children or yourself? A. No, he does not.

Q. Does he pay any part of the rent? A. No, he does not.

Q. How big is your present apartment? A. Five small rooms.

Q. Could you describe those rooms for the Court. A. My bedroom, the one bedroom is about 12x15, my living room is about 10x13, the children's room is about a 10x8, L-shaped. The other room that should be a bedroom is about six by seven which I keep my refrigerator in. And my kitchen is about a 10x12, 10x13.

Q. Do you have a dining room? A. No.

Q. In which room do you reside? A. In the 12x15.

Q. That's the bigger bedroom? (13) A. Yes.

Q. And in which room does Mr. Mattola reside? A. The same room.

Q. And where do your two daughters reside? A. In the L-shaped room, the 10x8.

Q. Do your daughters have separate beds? A. Yes, they do. They are on top of one another, they are double-deckers, bunk beds.

Q. Why are they on top of each other? A. The room isn't big enough to put them side by side.

Q. In which room do you eat? A. In the kitchen.

Q. Now, would you say that the fact that Mr. Mattola resides with you means that you have more space than you need for you and your two children? A. No.

Q. How much is your present rent? A. One hundred—

Judge Bauman: Excuse me for interrupting. Not out of any morbid curiosity, but I would like to know what is the bed arrangements in your bedroom; is it one large bed?

The Witness: Yes, it is a double bed.

Q. Would you give us the present rent? A. $175.00.

(14) Q. And how long have you been paying this rent? A. Since September '71.

Q. Does the Welfare Department give you a full allowance for this rent? A. Yes, with the three of us, our rent is included in our grant. We all have a share in the rent.

Q. Could you explain that? A. In other words, the children get so much a month each, I get so much, and in that amount comes the rent.

Judge Hays: Is it specified? The amount allocated to rent, is it specified?

The Witness: No, it isn't, but this is how it was explained to me through the Department of Social Services.

Judge Hays: You are supposed to pay your rent out of the general allowance you get?

The Witness: Yes.

Mr. Schwartz: Your Honor, this is a point of law, and in fact the regulations and the state statutes separate rent as a separate item of need, and rent in fact is computed separately.

Judge Hays: Has it been changed?

Mr. Schwartz: It has not as yet been changed. There are some contemplated changes, but the bill has not taken place.

(15) Mrs. Gordon: Excuse me, I must except to counsel's remarks, if Mrs. D'Alessio is implying either at the present time shelter allowances are not computed separately from the basic subsistence grant or if she is implying there is going to be any change in that in the future.

Judge Hays: You say they are computed separately from the basic assistance grant?

Mrs. Gordon: That is absolutely correct, your Honor. The two basic essentials of public assistance benefits are a subsistence or pre-added or basic grant, that is, a grant for food, clothing and incidentals, and a separately computed shelter allowance. We are concerned here with the shelter allowance.

Judge Hays: And is the client told which is which; what the allowances are?

Mrs. Gordon: Yes, quite so. In fact, I think if your Honor looks at the appendix at pages 47, 48, paragraphs 13 and 14, you will find an affidavit previously submitted by Mrs. D'Alessio wherein she states that she was going to get three-fourths of her shelter allowance, or three-fourths of $175. That was submitted—sworn to February 6, 1973.

Q. Mrs. D'Alessio, does the Welfare Department now pay the full $175 rent? (16) A. Yes, they do.

Q. Did there come a time in January of 1973 that you received a letter from the Westchester County Department of Social Services indicating that they intended to reduce your shelter allowance? A. Yes.

Q. And did this letter indicate why this reduction was to take place? A. Yes, it did.

Q. Could you tell us that reason? A. The reason was supposed to be for Mr. Mattola residing there.

Q. Is this document, which is marked Exhibit J, which has been furnished to defendant's counsel, a copy of a letter which you received from the Westchester County Department of Social Services indicating that the Welfare Department intended to reduce your grant? A. That's right.

Mrs. Schwartz: Your Honors, we would move that this copy of the letter be admitted as Plaintiffs' Exhibit J.

Judge Bauman: Show it to your adversary.

Mr. Schwartz: We have served a copy on our adversary, your Honor.

Mrs. Gordon: Your Honors, I don't except to this. (17) I would just like to ask counsel: Isn't this document previously in a record of this case by affidavit or otherwise?

Mr. Schwartz: It is in the record, your Honor.

Mrs. Gordon: It is my feeling, your Honors, that it would be perhaps best not to repeat matters already appearing in the record, particularly since we have copies of it in the record.

Judge Hays: I see no objection. It may be convenient to have it now.

(Plaintiffs' Exhibit J received in evidence.)

Q. Mrs. D'Alessio, did you receive a subsequent letter dated January 30, 1973, from the Westchester County Department of Social Services which also indicated that the Department of Social Services intended to reduce your shelter allowance? A. Yes, I did.

Q. Is this document which is marked Plaintiff's Exhibit K, which has been furnished to defendant's counsel, a true copy of that letter? A. Yes, this is it.

Mr. Schwartz: Mrs. Gordon?

Mrs. Gordon: No objection.

(Plaintiffs' Exhibit K was received in evidence.)

Q. Mrs. D'Alessio, did the Department of Social (18) Services in fact reduce your shelter allowance? A. Yes, they did.

Q. And are you now receiving a reduced amount of shelter allowance? A. No, I am not.

Q. Could you explain to the Court why you are now not receiving a reduced amount? A. Because I came to Legal Aid.

Mr. Schwartz: Your Honors, the record will indicate the state has agreed to keep Mrs. D'Alessio on full assistance pending the outcome of this litigation.

Judge Weinstein: Was it reduced for any period?

Mr. Schwartz: If it was, the retroactive amount was corrected.

Judge Weinstein: So she has not suffered any loss as a result of this activity.

Mr. Schwartz: That is right.

Q. Mrs. D'Alessio, what would happen to your children and yourself if the Westchester County Department of

Social Services in fact reduced your shelter allowance? A. We would eat less.

Q. What would be the effect on your family? A. It would be pretty hard.

Q. What do you mean by "pretty hard"? (19) A. It's hard to survive now. It would be that much harder with the lack of $43 and change. That would not enable me to get my food stamps.

Q. Are you able to meet the needs of your children and yourself now? A. No, I am not.

Q. Which needs are you not able to meet? A. Clothing.

Q. Can you explain to the Court what you mean by not being able to meet your clothing needs? A. I don't have enough money after I pay my Con Edison, purchase my food stamps, they don't go a long way, I have to add to it, I have to buy my household cleaning things outside of my food stamps, I have laundry needs that I have to meet weekly.

Mrs. Gordon: Excuse me, your Honors, I'd like to interpose a general objection to this line of questioning. We do not understand plaintiffs or the intervenors to have ever contested the adequacy of the basic grant or the subsistence grant, that grant for food, clothing and incidentals.

Mr. Schwartz: Your Honor, we don't contest the basic grant, but we are trying to demonstrate to the Court how welfare recipients live and what the effect of a (20) contemplated reduction would be on their lives.

Judge Hays: You may continue.

Mr. Schwartz: Thank you, your Honor.

Q. How would you meet your rental obligation if the Department reduced your rent? A. I would have to take it out of my food money.

Q. Does Mr. Mattola pay any part of this rental at all? A. No.

Q. Has your rental been increased because of Mr. Mattola's residence in the home? A. No.

Q. Now, Mrs. D'Alessio, have you ever had any contact with a Mr. Mike Morelli? A. Yes.

Q. And where did this contact take place? A. This contact took place at 324 East 4th Street where I once resided in Mt. Vernon.

Q. Would you tell the Court who Mr. Mike Morelli is? A. He is a case worker for the Mt. Vernon, Westchester Social Services Department.

Q. Did you ever have any conversation with Mr. Morelli regarding Mr. Mattola? A. Yes, I did.

(21) Q. Would you give the Court the substance of that conversation? A. The substance was I was recuperating from a back operation and Mr. Morelli made a house call and he was told of the presence of Mr. Mattola there because I was supposed to have a housekeeper, someone to take care of my children, and Mr. Mattola was doing this, and Mr. Morelli said that that was quite fine, in fact, "Why doesn't he just move in with you, lock, stock and barrel?" And we said that we didn't do things that way. He was helping me, until I was able to take care of myself, my home and my children.

Q. Did Mr. Morelli say anything about a housekeeper in that? A. He said that the Department was indeed saving a lot of money if they had to provide these people for me.

Q. What do you mean by "these people"? A. Someone to take care of me, a housekeeper for the home, and the children.

Q. Could you describe to the Court the present furniture that you have? A. You can look at it. You can't sit on it. It was that way when it was purchased. I was told where to buy my living room set, and it has stayed that way since I

purchased it eight years ago. The chairs can not be sat on. (22) They are worn away. They are covered with very inexpensive covering, and it fills my room.

Judge Weinstein: What do you mean you were told where to buy it? Who told you where to buy it?

The Witness: Social Services Department sent me down to Cane's Warehouse to look at furniture to purchase for my apartment.

Judge Weinstein: Will counsel for the government

The Witness: This was new furniture.

Judge Winstein: Will counsel for the government look into this? It sounds to me like there may be a criminal accusation here. Check on it.

Mrs. Gordon: Yes, sir.

Judge Weinstein: All right, continue.

A. (Continuing) I went down to Cane's warehouse with Mr. Mattola. I had no money. We went down and looked at the furnitrue and it was a package deal of three rooms of furniture.

Now, for them to hold this furniture, I had to put down a deposit of $15.00. The next morning, the Department of Social Services called me and informed me that in fact I could not buy furniture from Cane's Warehouse as that would not hold up, and they would not replace the furniture should it wear out. So, we lost the deposit on that money.

(23) Instead, they sent me to Atlas Furniture on Fourth Avenue in Mt. Vernon. I purchased a three-piece living room set for $119 that was very, very bad. It was new furniture, but there was nothing to it. But I was made to buy this. I was sent to Korn Suite on Fourth Avenue to buy two beds for my children, and I shared a bed—I had a bed, my daughter had one, and my youngest was still in a crib. The beds fell apart. The beds were made out of bal-

salm wood like what you would use in making model airplanes.

When I called the Department of Social Services and told them the condition of the furniture, they said they were very sorry that they could not replace this.

And that is the furniture that I still have half of that furniture.

I have been given as of lately two bunk beds, a set of bunk beds for my children, last December, and that's the first set of beds that they have had in eight years.

Mr. Schwartz: I have no further questions, your Honors.

By Judge Hays:

Q. What do the children do, sleep on the floor? A. No, my children had to sleep on the couch with me.

Q. Your two children, with you, on the couch? A. That's right, on a pull-out couch.

(24) Cross Examination by Mrs. Gordon:

Q. Mrs. D'Alessio, just to pick up on that last statement, because I am a little unclear, when you started your testimony, I believe Judge Bauman asked you where you slept, and you said you slept in the larger bedroom, is that right? A. This is now where I am residing, yes.

Q. Where you are residing now. You sleep in the master bedroom? A. Yes.

Q. In a double bed? A. Yes.

Q. And Mr. Mattola shares that bed with you? A. Yes.

Q. And the two girls—right, you have two girls? A. Yes.

Q. The two girls sleep in the second bedroom, is that right? A. They sleep in bunk beds.

Q. In the second bedroom in bunk beds. I was just about to say that. A. Yes.

Q. When was this situation with the children sleeping (25) on the sofa with you? A. This was at Fourth Street.

Q. Is that where you live now? A. No, that is not.

Q. How long ago was that? A. That was about six years ago.

Q. I see. That living at Fourth Street and sleeping with you and the girls sleeping on the sofa has nothing to do with the point in time where the Welfare Department told you that your shelter allowance was going to be prorated, right? A. Oh, no.

Q. Now, the cost of your rent is $175, is that right? A. Yes.

Q. And you receive a shelter allowance equal to $175 is that right? A. $179.00.

Q. $179.00, okay.

Now, when you were describing your apartment before, you indicated that there was a living room approximately 12 x 14, right? A. That was my bedroom.

Q. That's your bedroom? How big is the living room? A. The living room is about 10 x 13.

(26) Q. 10 x 13? A. Yes.

Q. I don't mean to go into tedious detail on that, Mrs. D'Alessio, but here is the affidavit that counsel served on me last night and I refer you to Paragraph 4. I just want to get the record clear.

It says here the living room is 12 x 14. A. Well, I get a little confused. Yes, that's about right. Okay.

Q. And the bigger bedroom is about 12 x 15. A. That's right.

Q. And the girl's room with the bunk bed is about 8 x 10? A. Yes.

Q. Now, there is a fifth room in the apartment aside from the kitchen, right? There is this small room, approximately 6 x 6 or 5 x 6, right? A. Yes.

Q. Which you said before when you were on the stand was a bedroom? A. Was supposed to be.

Q. But you don't use it as a bedroom? A. No.

Q. Now, you recited a conversation you had with Mr. (27) Morelli, who is apparently a case worker at a point in time, right? A. Yes.

Q. And Mr. Morelli suggested to you that Mr. Mattola move into your apartment completely at that time? A. Yes.

Q. Mr. Mattola was assisting you when you were ill. Did Mr. Morelli suggest to you that Mr. Mattola mve into your apartment and not pay you any share of the rent? A. He mentioned nothing about paying anything. He just said, "Why doesn't he just move in? What's the difference?"

Q. You had an additional conversation with Mr. Morelli to the effect that you were saving the Westchester County Department of Social Services some money because you didn't have a housekeeper at that point in time, right? A. That's right.

Q. Now, the reason that you might have had a housekeeper was because you were ill at that time, right? A. I was totally disabled.

Q. Did Mr. Morelli lead you to believe in any respect that had Mr. Mattola not been there or had you needed the assistance of a housekeeper you would not have obtained one from the Department? (28) A. No, he did not.

Q. Now, you have said that Mr. Mattola doesn't pay you any share of the rent, right? A. Right.

Q. At least we are talking now from January, February, March, 1973 forward, that's the only period of time with which we are concerned.

Now, he has worked from time to time at odd jobs? A. Right.

Q. Has he received unemployment insurance? A. Yes, he has.

Q. Now, as a result of your participation in this action, your shelter allowance was continued at the actual cost of

your rent, notwithstanding Mr. Mattola's presence in your house, right? A. That's right.

Q. Now, you indicated that if the shelter allowance had in fact been reduced—by the way, do you know how much it was to be reduced by? A. $43 and change. I am not exactly sure on the change.

Q. If it had in fact been reduced, would you have to make up the rent from your basic grant? A. Yes.

Q. From the other money you were getting from the (29) Department? A. That's right.

Q. And therefore you would eat less and so on? A. That's right.

Q. If in fact the shelter allowance was reduced by reason of Mr. Mattola's presence, why wouldn't you ask Mr. Mattola to pay his share of the rent? A. I don't understand the question.

Q. If the Department in fact reduced your $175 by a fourth, attributable to Mr. Mattola's presence in your household, right; so you were getting a fourth less than you were getting before; why wouldn't you ask Mr. Mattola to pay you that quarter? A. Because it was not only his fair share of the rent at the time. They went on to go further. They wanted his fair share in food, they wanted his fair share in Con Edison, in other words, they wanted his fair share in the entire household budget.

Q. I show you Plaintiffs' Exhibit J, which you looked at before and indicated was a true copy of the letter you received on 1/22/73. Would you look at it again and is this the document you saw before? A. I am familiar with the document. It states about his fair share of the rent. But verbally, I was told that (30) if he in fact were to reside there, he would be expected to pay his fair share on the rent, but everything else in the household. That's not in writing, but that's what was told to me verbally.

Q. Mrs. D'Alessio, would you please just read this 2 sentences right here, which is 1, 2, 3, about four lines down

from the top. A. "Quality control reports of 10/15/72 indicates that Mr. Mattola resides with you and your family. Therefore, we are prorating your rent three quarters of $175, which comes to $131.40."

Q. Thank you.

Now, Mrs. D'Alessio, you so far submitted in this entire case two affidavits, right, one early on when you applied to intervene, one signed, I guess, yesterday or the day before, which I got last night, and a complaint, is that right? A. That's right.

Q. Which you signed? A. Yes, ma'am.

Q. Have you ever previously alleged any claim in any of those papers that the Department of Social Services told you that they were going to reduce your entire grant, not just your shelter allowance, not what you just read, but (31) your entire grant because of Mr. Mattola's presence in the household?

Have you ever made that claim? A. I don't understand the question. I'd like to hear it again.

Mrs. Gordon: Read it back.

Mr. Schwartz: The pleadings and the affidavit speak for themselves. I can say the claim has not been made. Mrs. D'Alessio has testified that there was a contradiction between what was told to her verbally and what was indicated in the writing that was shown to her.

Judge Hays: There is nothing in the records that indicates that she has previously made any such claim?

Mrs. Gordon: That's correct.

Judge Hays: This is conceded.

Mrs. Gordon: Fine.

Q. Then let's just return to the first question that I asked you in this series.

When the Department advised you in Plaintiffs' Exhibit J that they were going to pro rate your shelter allowance by reason of Mr. Mattola's presence in your household, and that they were going to reduce a fourth, why didn't you ask Mr. Mattola to give you a fourth? A. For the simple reason, Mr. Mattola was not (32) residing with me at the time. This was an assumption on the Department's part, because he had been there when I was in the hospital and stayed there until I was able to get around.

Q. Mrs. D'Alessio, is it your claim in this action that Mr. Mattola does not reside with you? A. It is my claim that Mr. Mattola resided with me only when I was in the hospital and convalescing.

Judge Hays: Did he reside with you in January 1973?

The Witness: Yes, he did, sir.

Judge Hays: This was while you were convalescing from your operation?

The Witness: That's right, and this is when this matter came and I took it to Legal Aid and this went to Court, and then when I got papers stating that I had won my case, then he did in fact move in. But he never lived with me permanently.

Judge Hays: Until?

The Witness: Until after the outcome of the case in court.

Q Mrs. D'Alessio, I read to you from your affidavit first submitted in this case, dated February 6, 1973:

"During all the time that I resided in Mt. Vernon, my male friend resided with me fore more than two (33) months each year. We have resided together for various times in the last six years. During the months of December, 1972, and January, 1973, Mr. Mattola resided with me

continuously. Mr. Mattola presently resides with my children and myself and we intend to reside together in the future. Mr. Mattola and I intend and desire to be married."

And hen you go on "and I have not been able to marry him because I am married to somebody else."

All right, now, I am not your counsel, Mrs. D'Alessio, but I just want to make it clear to you, if it is your claim that Mr. Mattola does not reside with you—

Judge Hays: That isn't her claim.

Mrs. Gordon: When I first questioned her before I read her this affidavit she said he didn't reside with her.

Q. I want to make sure what your claim is, Mrs. D'Alessio, so I can argue whether or not you are properly a part of this case. A. At the time that you were referring to, he was not residing with me permanently.

Q. When you got Plaintiffs' Exhibit J in the mail? A. He was not residing with me.

Q. He was not? A. No, ma'am.

Q. Therefore, the only conclusion we could draw from (34) that, Mrs. D'Alessio, would be that the Administrator was in error when he told you that he was going to reduce your allowance because Mr. Mattola was residing with you?

Mr. Schwartz: Your Honor, I object. These Administrators are the agents of the defendant. The defendants are bound by the determinations that they make.

Mrs. Gordon: Quite frankly, your Honors, I did not plan to take all this time on this point. I simply want to know if this woman had a non-contributing lodger in her household at the time

of the events giving rise to this action. That's all I want to know.

Judge Weinstein: The present situation, I take it, the man is living with her. It is conceded.

Q. Is that conceded? A. Yes, ma'am.

Mrs. Gordon: Okay.

Judge Weinstein: And if he continues to live there the state intends to cut the rental allowance. Why don't you get to that point? Why aren't you paying now?

Judge Hays: Are you finished your questions?

Mrs. Gordon: No, your Honor, I have a few more.

Q. As Judge Weinstein suggested, let's take it from this point in time. If the Department reduced your shelter now by reason of Mr. Mattola's being there, why wouldn't you (35) ask him to give you a quarter of the rent?

Mr. Schwartz: Your Honor, she has been asked that question three times.

Mrs. Gordon: She has never answered it, your Honor.

A. This man has just come out of the Veterans Hospital after three weeks of hospitalization, and he is not fit for work right now due to extreme high blood pressure, hypertension. And his only way of work is a golf course, and he is not going to go out on the golf course and have a stroke, so that he can pay $43 a month rent.

Judge Bauman: Let me put this to you, ma'am.

It seems to me that you are developing pretty much what appears in plaintiffs' brief, namely, as the

situation now exists and as to what type of hearing there is, she wouldn't be permitted to go into any of this. The kind of hearing that is at least referred to in plaintiffs' briefs, if there were a real hearing, rather than a conclusive presumption, this is precisely the kind of thing that a hearing examiner might go into, but I think what you are doing is to in effect, at least so far as I am concerned, establish the fact that what this system creates is a conclusive presumption of contribution from the fact of residency.

Mrs. Gordon: Your Honor, just to respond to that (36) for a moment. I think one has to keep in mind vis-a-vis a welfare department, there are generically two types of people in the world, those who apply for public assistance and get it, and those who do not apply for public assistance and do not get it.

Now, in all the plaintiffs' papers, they have claimed essentially two categories of lodgers, okay, of which Mrs. D'Alessio represents one, I assume, that one being the man can't afford to give me any money, which I think is essentially what she just said.

Now, there are other categories represented by Mrs. Hurley, and by Mrs. Aloise, who have on the conceded facts lodgers who are working but who refuse to pay a portion of the rent. All right?

Now, my next question to Mrs. D'Alessio is:

Q. If it is your belief that Mr. Mattola could not afford to pay a share of the rent either because he is ill or for whatever other reason, why didn't you suggest to him that he apply for public assistance? A. He wants nothing to do with public assistance.

Q. Is he aware of the public assistance program? A. Fully aware.

Q. Yes, because you get public assistance? A. That's right.

(37) Q. Now, I just have one last question.

Judge Weinstein: Excuse me, if I understand the position, just so I can try to get it clear, it wouldn't make any difference whether he was ill or not ill, or had money, as far as the state regulations were concerned; they would be forced to cut the rental allowance?

Mrs. Gordon: The rental allowance is automatically prorated upon a factual finding that there is a non-recipient in the household who is not in fact contributing any ascertainable amount to that household, or more properly, an amount that is ascertainable over $15 is actually how it works.

Judge Weinstein: If he were on welfare—?

Mrs. Gordon: If he were on welfare, your Honor, he would get a basic grant and a shelter allowance. Okay? He would fully make up his quarter share, and if he had no money—he would pick up his quarter share of rent and he would get a basic grant, and that would avoid his eating out of Mrs. D'Allessio's and her children's basic grant, because she gets a basic grant for three, not for four.

Judge Weinstein: Let's forget about the basic grant because we don't have that case before us; we are just talking about the rent.

Mrs. Gordon: It has an effect. If Mr. Mattola is (38) really poor and he doesn't work and he doesn't make any money, he has to eat.

Judge Weinstein: As far as the state is concerned, there are only two types of people who are entitled to live in a place like this, those that are on relief and those who have money to pay their fair share.

Mrs. Gordon: As a practical matter, I think that is substantially accurate, your Honor. As a technical matter, it is not quite; it is something like Wyman vs. James. Mrs. D'Alessio has a choice. She may let Mr. Mattola live there and she may not recover the quarter from him, the quarter of the rent. She may take it out of her basic grant to some extent as she apparently is doing. She may pay the proceeds of her basic grant toward the rent.

Judge Weinstein: If she does that she violates the fiduciary duty to the children.

Mrs. Gordon: One would think so. However, in any given situation there is a margin, okay? She may have a little extra money in her grant. She may not. Now, Judge Bauman in his original opinion alluded to this situation. He said the result that would be caused in this situation is very disadvantageous to the children, because it might be that Mrs. D'Alessio would be using all of the proceeds of that basic grant in effect to support Mr. Mattola, and the better (39) social result may be to let Mr. Mattola live there rent free.

Now, what happens if Mrs. D'Alessio actually does that? In other words, if she truly disadvantages the children. What happens is she can have all of those things happen to her that Judge Oakes recited in his Second Circuit opinion: She can be counseled, she can get other types of social work help, and ultimately, her children can be removed from the premises if she is in fact devoting the major proceeds of that grant to Mr. Mattola, and, indeed, under Section 145 of the Social Services Law, she can be arrested, a practice which very often happens in California. It is a practice which is used in California.

We don't do those things to her. Down to the bottom line, as in Wyman v. James, we let it be her choice. If on a home visit we find it seriously affecting her children, we have a panoply of remedies to invoke against her, but we do not use those harsh remedies in the normal context.

Judge Weinstein: I'd like to separate, if I can, although I understand they are related, the rental problem from the basic allowance problem.

Is there any evidence that basic allowance is being used to support this man, Mr. Mattola?

Mrs. Gordon: Just her claim that if her shelter allowance was in fact reduced—

(40) Judge Weinstein: No indication that she is taking the children's food money and using it to feed the man?

Mrs. Gordon: There is no evidence of that in our record. However, on her testimony—

Judge Weinstein: Let's put that out of the case and just direct ourselves strictly to the rental problem, although I understand the relationship.

Judge Bauman: You understood when you referred to my opinion, the part of my opinion you referred to was in effect, in substance, even if a man were paying for his own food, the fact that the housing allowance would be cut would require the recipient to divert from the children's food allowance a sufficient amount to make up the difference which is deducted by the authorities.

You did understand that was the implication?

Mrs. Gordon: I did understand that, your Honor.

I would have to call your attention if he is in fact buying his own food, under the regulation, he would be a contributing lodger. All right? Not a non-contributing lodger, but a contributing lodger. And

the amount that he contributes would be put on one side of the family budget, the public assistance unit's budget, the public assistance unit's needs would be budgeted on the other side of the piece of paper, and the amount that he contributed offset against (41) the total grant over a certain amount of money which is recited in the regulation.

Judge Bauman: I think we ought to get through with the witness. I apologize to you.

Judge Weinstein: I think we ought to get some of these cleared up.

Mrs. Gordon: I think it will become clear in the papers. I don't think we need testimony.

Q. Mrs. D'Alessio, I am sorry to keep you. I have one set of questions with respect to the furniture and the Cane's Warehouse situation you testified to.

Is Cane's Warehouse in New York City or in Westchester County? A. New York City.

Q. Up on Third Avenue near 80th Street? A. Something like that.

Q. Now, is it your testimony that somebody from the Department of Social Services told you that when you went to spend your furniture grant you had to go and spend it at Cane's? A. No, I was told to go to Cane's because of the package deals and when I got down there, the next day, I got a phone call stating that in fact I should not purchase furniture from Cane's as they had a worker down there, the same day that I was there, and looked over the package deal (42) and they were not substantial enough.

Q. In other words, there wasn't a big savings and it wasn't worth it to go there? A. It wasn't a—it was a big sale, or big savings. The furniture wasn't fit.

Q. Who told you this, somebody from Social Services or a friend? A. Social Services.

Q. So, fine, one day you were told that Cane might be

a good place to go and the next day you were called and told Cane's wasn't a good place to go because you wouldn't save a lot of money by going there? A. Yes. It wasn't the point of the money; it was the quality of the furniture.

Q. I am sorry, I beg your pardon. A. So, instead, they sent me someplace just as bad only closer to where I live.

Q. Okay, so did they recommend this other furniture place? A. They gave me no ultimatum; they told me to go there.

Q. After the Department withdrew its recommendation that you should go to Cane's Warehouse, did it tell you that you had to go to Atlas? A. That's right.

(43) Q. And that you could buy furniture at no other place? A. That's right.

Q. Who told you that? A. I don't remember the worker's name. I have had about a dozen or more. I really have no idea.

Q. I am asking these questions pursuant to the Judge's request because I'd like to find out, be able to locate the person involved if there is such a person.

Approximately what point in time was this? A. August, the middle of August, or the beginning of August of 1966.

Q. And a person in the Mt. Vernon Center? A. Yes.

Judge Weinstein: Was he a man assigned to your case?

The Witness: It was a woman at the time. I had a case worker at the time.

Judge Weinstein: It was a female case worker?

The Witness: Yes.

Q. It was the same case worker you normally had at that time? A. Yes.

Q. Now, you indicated that the quality of the furniture (44) that you got from Atlas was not good, is that right? A. It was terrible.

Q. Is that the same furniture you still have in the house? A. I have the two chairs. They have since, about five years ago, possibly six, purchased for me a Castro convertible couch that pulled out into a double bed, which is worn, there is no more padding, there's springs coming up through the seatings and whatnot.

Q. I am sorry, I am not trying to make this complex. Do you still have the furniture from Atlas in your apartment, or did you substitute it? A. Yes, I have. I have two pieces of it left.

Q. How much did you buy in the first place? A. The three pieces were $119.00.

Q. And of the three you have two left? A. Yes.

Q. From and after the time you noticed this Atlas furniture was no good or deteriorating, did you apply to the Department for additional furniture grant? A. I went to the Department and told them of the furniture that I had. They sent a man from Atlas to fix the chair that was definitely broken, and it was just a temporary thing. They never offered me a new furniture grant. No, in (45) fact it took me three years to get the beds that I now have for my children and I was told that was my last furniture grant.

Q. Somebody told you that the beds you recently got was your last furniture grant? A. In other words, that was all I was allowed. The amount of money that those beds cost that was all that I was allowed.

Q. Who told you that? A. I don't remember her name.

Q. Is it your present case worker? A. No, it is not.

Q. When did this happen? A. This happened, I believe it was last December or the December before. It was just shortly before Christmas, either one or two years ago.

Q. One last question.

From the time you purchased the furniture at Atlas, until the present day, you have added furniture to your apartment, is that correct? A. Yes, I have.

Q. Where did you get the money for the furniture? A. Mr. Mattola bought my bedroom set.

Q. When did he do that? (46) A. He did that in 1970.

Q. And that's the only addition you have made? A. As far as furniture goes, yes; that he has purchased, yes.

Q. I am only asking you really—so far as adding to the apartment since the time of Atlas, you mentioned two bunk beds before, they came from the Department of Social Services, right? A. That's right.

Q. And in the bedroom, the master bedroom, Mr. Mattola bought the bedroom set? A. That's right.

Q. Were there any other additions? A. He bought a china cabinet for me to put my dishes in.

Q. When did he do that? A. The same year.

Q. 1970? A. That's right.

Q. Any other additions?

Judge Bauman: The Castro convertible.

Q. And the Castro convertible, right; he bought the Castro convertible? A. No, he did not.

(47) Judge Weinstein: This is peripheral.

Q. Is that it, the Castro convertible? A. That's the—

Q. Did you get the money for the Castro from the Department? A. I received some money, that was sent right from the Department.

Mrs. Gordon: That's all. Thank you, Mrs. D'Alessio.

Mr. Schwartz: No further questions, your Honor.

Mr. Alexander: May I ask one question. I represent the County of Westchester, and I am concerned about this directive to go to a certain place as I know the Bench may be. I just want to try to pinpoint more definitely with one or two questions.

Cross Examination by Mr. Alexander:

Q. Was this a telephone conversation you had with somebody in August of 1966? A. It was in the office.

Q. In the office of the— A. That's right.

Q. —of the Department of Social Services? A. That is correct.

Q. Which office? (48) A. The Mt. Vernon office in the Con Edison Building.

Q. And it was in August of 1966? A. That's right.

Q. Where were you living at that particular time. A. At that particular time I was living with my mother at 142 East Third Street in Mt. Vernon.

Q. 142 East Third Street. And what is your mother's name? A. My mother's name now or then?

Q. Then. A. Mrs. Claire Hearst.

Mr. Schwartz: No further questions, your Honor.

Judge Hays: You may step down.

(The witness was excused.)

(49) Mr. Schwartz: Your Honors, the plaintiffs call Dr. Herbert Gans.

Judge Bauman: I hope you will all indulge me in my eccentricity. I permit no writing or movement during the administration of the oath.

HERBERT J. GANS, called as a witness, being first duly sworn, testified as follows:

Direct Examination by Mr. Schwartz:

Q. Dr. Gans, where do you reside? A. I reside at 460 Riverside Drive in New York City.

Q. How long have you resided in New York City? A.

Since 1961, with the exception of 2 years when I was in Massachusetts.

Q. Would you tell the Court what your professional qualifications are?

Judge Weinstein: Don't you have some kind of resumé so we don't have to go through all this, not that I am not delighted to hear you, Doctor.

Mr. Schwartz: We do, your Honor, but, unfortunately we don't have copies for opposing counsel.

Judge Weinstein: Didn't I instruct counsel that if you are going to call any expert witnesses you are to change their proposed reports and qualifications?

(50) Mr. Schwartz: The instructions were that we exchange summaries of their testimony and, unfortunately, we were not able to meet with Dr. Gans until last night.

Judge Weinstein: Any objection to our looking at that?

Mrs. Gordon: I beg your pardon?

Mr. Scharwtz: We will make copies—

Mrs. Gordon: Do I have objection to him distributing them to the panel; is that what you asked me, your Honor?

Judge Weinstein: Yes.

Mrs. Gordon: I have no objection.

(Plaintiff's Exhibit O received in evidence.)

Q. Tell the Court what your areas of specialty are, Dr. Gans. A. I am a sociologist and planner. I teach in the sociology department of Columbia.

Q. Could you speak louder, please. A. I am a sociologist and a planner. I teach in the department of sociology at Columbia University, primarily in the areas of urban sociology and urban poverty.

Mr. Schwartz: Your Honors, based on the resumé material which we have submitted, we would ask that Dr. Gans be declared an expert witness in his fields.

(51) Mrs. Gordon: Your Honors, of course, I would like to see the resumé first, but—

Judge Weinstein: It is thick enough to make him an expert. (Laughter.)

Mrs. Gordon: Mr. Schwartz, do I understand your motion is to qualify the witness as an expert in urban planning and urban sociology?

Mr. Schwartz: Housing and sociology.

Judge Bauman: And urban poverty, I believe he said.

Mrs. Gordon: Your Honor, I am going to except to the motion in terms of the housing expertise only, frankly, because I have not had an opportunity to read through this entire resumé.

Judge Bauman: Pass it up and let me read it, please.

Judge Hays: All right, you may proceed with your questions.

Mr. Schwartz: Thank you, your Honor.

Q. Dr. Gans, are you familiar with the writings concerning the living arrangements of the various income levels? A. Yes, certainly.

Q. Have you studied this subject? A. I have done two studies personally, one of a poor (52) community in Boston, another of a suburban community near Philadelphia. In addition, I have kept up with the literature of the housing, the sociology of housing, the poverty, for the last 25 years, because that is my work.

Q. And specifically, are you familiar with the writings in the field concerning the living arrangements of welfare recipients? A. Certainly.

Q. Are you familiar with the regulations that are involved in this case? A. Yes.

Q. And are you familiar with the definition of the term "lodger" which is used in these regulations? A. Yes.

Q. And are you familiar with the living arrangements that are typified by the plaintiffs in this action? A. Yes, I have seen the affidavits.

Q. Now, as an expert witness, would you give us your opinion as to whether the living arrangements of the plaintiffs in this action are more prevalent among the poor than among the other income groups? A. From all the data we have, they certainly are, and for a variety of reasons. Poor people often live a very insecure existence, not only in terms of the amount of money (53) they have, but the uncertainties about how long they will have it, or if they are employed, for how long they will hold their jobs.

So, quite frequently you do get a pattern among poor people, if they can't work or they can't find work either temporarily or permanently, of moving in with a relative, either temporarily or permanently, because there simply isn't any money to establish or to continue to maintain one's own household. And typically, then, the people then become lodgers, help out in the family in the various ways in lieu of paying rent, helping to raise the children, taking care of the house, doing a variety of things. I think that's one major explanation.

Judge Hays: Is it unusual for someone in this lodger category to be in fact eligible himself for welfare but who doesn't believe in the system and doesn't take it.

The Witness: Yes, I think this happens. There are poor people who either feel that their poverty is temporary and don't want to go on welfare, don't want to get involved with being on welfare—welfare

itself is a full-time job quite often—you know, filling out of the forms, dealing with the regulations, dealing with the social workers and the case workers, and what have you, and so they simply say we are not going to go on welfare and hope (54) perhaps their problem is temporary. Other people are just, you know, have the pride of independence, as it is sometimes called, and say they want to make it on their own however that is going to be.

Judge Weinstein: There have been some studies of the percentage of people in New York who take welfare. What is that percentage?

The Witness: I don't know of any studies in New York. We know that in terms of the census data we know that less than half the people who are entitled to welfare are on welfare, but we haven't—the studies haven't been made that would indicate whether this is because they don't apply but apply or are rejected. People that don't apply for welfare are not very visible and I haven't seen any research that would put numbers on this kind of thing.

Mr. Schwartz: Your Honor, we have annexed a graph to the affidavit of Smith submitted with our supplemental affidavits which we have served upon our adversary, and we would like Dr. Gans to explain the operation of this graph to the Court.

Judge Weinstein: Let's see if I can find it. Do I have a copy of it?

Mr. Schwartz: Yes, you should, your Honor. The first affidavit would read "Supplemental Affidavit".

(55) Judge Weinstein: All right, proceed.

The Witness: Well, basically, this is a set of graphs which indicate the percentage of households in the entire society, and this is from the census, who have lodgers or relatives other than spouse or children living with them, and it is divided up into six

categories of family types in the way the census usually does it.

First, the family headed by a white male, second the family headed by a white female, third the family headed by a black male, fourth the family headed by a black female, and then fifth, the family headed by a Puerto Rican male, and sixth, the family headed by a Puerto Rican female.

And for each of these family types, the table, the chart, gives the median incomes for that family type and also the percentage of that family type which is below the 1970 poverty line, the poverty line I think then being around $4,000.

I won't go into the entire table but it shows two things: First of all, the lower the median income and at the same time the higher the percent of that family type who are living below the poverty line, the larger the number of people who are living in the house who are not spouse or children.

So that, for example, in all households headed (56) by white males where the median income is over $11,000, the total number of lodgers as defined by the census comes to the 2.5%. Among the families headed by white females, the total number of lodgers —and this is only one of six categories in this table— total number of lodgers is about 8%. The median income of white female headed families is $4500. If you take the income group that is lowest, the two income groups that are lowest, the families headed by black females, you have a percentage of lodgers which is 13%; among Puerto Rican females the percentage of lodgers is again about 8%, the median income is $3100.

So, basically, the chart shows that the lower the income, or rather, there is a relationship between

lowness of income and the tendency to have people other than spouse and children living in the household.

The second thing it indicates is that when a family is headed by a woman, there is a much greater tendency to have people other than children living in the household, and this holds for white women, for black women, for Puerto Rican women. And I think this is what I was going to say was the second page or reason for the greater prevalance of the doubling up phenomenon among poor people, and that is particularly among poor people where the head of the household is a woman.

(57) Now, we have known I think for about a hundred years, or really the data have only been available recently, that where there is a high degree of male unemployment in the society, you either get —you then get the development of what the census and sociologists call a female-headed family, in other words, the male being unable to a breadwinner either leaves the household in desperation, or in some cases is not at home because he can't be a breadwinner so he is pushed out of the household. And this tendency of the female-headed families is today most associated with the black community and it is true that it is higher among black women than it is among white women these days, but from the historical evidence we have this has been a steady pattern: it was true among the Irish, among the Italians, among the Jews at the end of the Nineteenth Century when there was an economic recession and the males had a hard time getting a job, the number of female-headed families increased.

Where you have a situation where you have a female-headed family and where you have several

children, you get the doubling up phenomenon in the sense that relatives, mostly relatives, sisters, in-laws, mothers, tend to live with the female head of the household, and this is really what is in, among other things, these charts.

So that again when you have that female-headed (58) family, you get almost automatically the doubling phenomenon simply to give aid to the head of the household.

Finally, there is a third reason which I think explains why often you get people who are lodgers in terms of the welfare definition who are not lodgers by the cenus definition, in other words, non-relatives who are living in the household.

One case is the case that was presented this morning where you have a man living in the household of a divorced family and again a separated family, and divorce has always been very difficult for the poor to get because (a) it costs money to get divorced, (b) it costs money to get a lawyer, until recently it was impossible for poor people to get free legal help, so that there has been a long tradition of simply physical separation but no divorce.

The other thing which has nothing to do with men or women—this is just as I said before where there is poverty and insecurity people get very dependent on each other to tide them over during crises, so that you have, and this has been found in studies all over the world among poor people that you have a very generous extension of help and hospitality to others, relatives and close friends.

And this exists not because poor people are necessarily more altruistic or more generous than other people, (59) but because this is really the only way you can survive in a crisis. If you don't have somebody who you can rely on to bail you out with a

couple of dollars to get you to the hospital, if one of your kids suddenly gets sick, to provide you a room if your landlord evicts you or if your building burns down or becomes uninhabitable, if this ability to call on somebody for help is not available, then survival for the poor is much more risky. And so what happens is you get a pattern of mutual help, or mutual obligation, people helping each other because they know if they help somebody when they have a problem, they will be helped in return.

One part of this helping phenomenon is people making room in their house for somebody who is in need of shelter temporarily or permanently, and again only in this case on the grounds that if I don't do it for him or her now, he won't do it for me when I am faced with that problem.

As I said before, this is a very typical pattern among poor people in this country, among poor people everywhere, really. In fact, it has been institutionalized in the godparent relationship that you find quite often among poor people in the sense that a friend is made a godparent and really incorporated in the family because then the obligation to him or her to provide help is strengthened and the godparent becomes a helper and the obligation to help (60) is more firmly established. And so, people exchange godparentships to bind this relationship and the security that is needed for giving help more firmly.

I am sorry, I didn't mean to lecture. This is a very important phenomenon that middle class people don't do much of and don't understand.

Q. Dr. Gans, as a result of this, would you say that the poor have a—or do the poor have a different concept of family than the other income groups? A. Yes and no.

Formerly, you know, the family structure among the poor is not really all that different than in the middle class, except when there is a female-headed family, and then what you get is something that is not very, very true in the middle class. This is really the big difference between the poor and the middle class.

When you are poor, the number of people you can trust is often very small. The poor people have lots of enemies. Therefore, the family becomes much more important because of the whole, by and large, taking everything else, leaving everything else consonant, the family members can be trusted more easily than others, so the family becomes much more important as a source of trust, as a source of help, as somebody needed to call on when there is a crisis, (61) temporarily or permanently. And when the household is female-headed, when the needs are greater, you call on more members of the family, and to put it quite simply, although most middle-class people live in the nuclear family, they have what the sociologists call, which is called the extended family, cousins, aunts, nieces, nephews, which visit them once a couple of weeks or every month, and that's the extent of the relationship.

Among poor people, this extended family is very important because in the end the family provides the help that nobody else will, and therefore, the extended family is really the bastion of security for a family.

Q. Dr. Gans, do planners have a definition of adequate space with respect to a residential dwelling that is used? A. There are a variety of definitions, and I think the standard one was set up by the American Public Health Association many years ago and it is being revised. The problem with it, it isn't very relevant, especially in New York City, because if you take the APHA definition of adequate space, most poor people are living in inadequate space. In other words, the standards that they do have are

not being met by most of the housing in the New York City area, the housing for the poor.

(62) Q. Is there one generally accepted standard? A. Not really, no.

Q. Could you give us your opinion as to whether the plaintiffs in this case who reside with lodgers are likely to have excess space in their apartment?

Mrs. Gordon: Objection to "are likely". The facts with respect to these plaintiffs are plain on the record, including their housing accommodations.

Mr. Schwartz: Your Honor, by "plaintiffs" I mean the plaintiff class generally. I am not referring to any specific class of family, but I am referring to the class of welfare recipients generally who reside with a lodger as defined in defendant's regulations.

Mrs. Gordon: The named plaintiffs and intervenors are the designated representatives of that class.

Judge Hays: Let the question be asked with respect to the plaintiffs. What we are talking about here is the kind of poor peole who are involved in this case.

Mr. Schwartz: That is right, your Honor.

Q. Do they generally have adequate space or inadequate space? A. No, I think it is very clear that generally they have inadequate space.

Judge Hays: What do you say about the space that (63) Mrs. D'Alessio described, how does that fit into the definition of the pattern the sociologists have developed?

The Witness: I would say, except for her living room, if I remember, it is barely adequate, the rest

of her apartment is a pretty crowded one. There was reference to a room 5x6, which is intended to be used as a bedroom, and I find it hard for anyone to believe that any human being, other than a small child could live in the room 5x6. By "live" I mean physically exist. The emotional implications of a person living in that room 5x6—

Judge Hays: Not counting that room, Mrs. D'Alessio has four rooms. Counting the lodger there are four people. Is this considered adequate or inadequate judging by the size of the rooms?

The Witness: In terms of the number of rooms, as long as the children are small, you know, I would say it is barely adequate, but—

Judge Hays: She doesn't use that 5x6 room. She keeps a refrigerator in it.

The Witness: I assume that even on the real estate pages of the New York Times that would be called a large closet, and not—or maybe half a room. 5x6 doesn't strike me as a room.

Judge Hays: You agree you would count it as 4, rather (64) than 5.

Mr. Schwartz: We plan to go into the question of space more fully with our next expert who is a practicing urban planner. We have one final question for Dr. Gans and that is, assuming that a mother resides with two children, two young children and that they are recipients of public assistance, that the family's rental expense is $175 and that the Welfare Department pays this $175 and gives the family a total grant of approximately $336, the family has no other sources of income, in your opinion, Dr. Gans, what would be the effect of a $44 reduction in the grant on the mother and her two children because of the presence of this lodger in the home?

A. It really doesn't take a sociologist to answer that question. D'Alessio, I'm not sure if I get her name right, said herself, you know, the children, the family eats less, the money has to come from somewhere, it may come—it may make it difficult if one of the children get sick for the family to go to the hospital or to the clinic and you find this quite often that poor people don't have, you know, even the thirty-five cents to take them to the clinic or to the Welfare office to make an appointment.

What typically happens is that people, since you have to eat before anything else, the rent doesn't get paid (65) for a few months, and then you fall behind in your rent because you're taking food money out of the rent, and I think —it seems to be virtually impossible for any family which includes in this case a woman and two children, to eat and provide clothing and the other needs of human life on what I guess is about $160 a month.

This may have been adequate in 1940 or 1950, but certainly can't take care of the basic needs of the family in New York City in 1974.

Mr. Schwartz: Your Honor, the plaintiffs have no further questions.

Cross Examination by Mrs. Gordon:

Q. I refer you to the census chart that counsel showed you.

Does that have a number on it?

Mr. Schwartz: No.

Q. It is annexed to this Smith affidavit. Not being very good at charts, I would just like to read the last paragraph of this Smith affidavit and ask you if you agree with what Miss Smith said.

This table, meaning the chart, shows that in general, those groups of heads of households with the lowest median income namely white, black and Puerto Rican females (66) and similarly the largest percentage of persons living on income below the poverty level are considerably more likely to have one or more persons besides their immediate family living within their households than are those in the higher income groups.

Now, is that a correct statement of what the table shows pertinent to this case? A. Yes.

Q. Now, does this table show or does Mrs. Smith make any conclusion or for that matter do you make any conclusion from the table as to how many—what percentage of the families that have these lodgers have contributing lodgers as distinguished from non-contributing lodgers? A. This table doesn't—the census—

Q. This table doesn't show that. A. This table doesn't make any distinction on that issue.

Judge Hays: You are aware of no data on that?

The Witness: I don't know of any.

Q. I'm sorry I didn't quite catch that.

You don't know yourself of any distinction or studies which indicate what percentage of families with lodgers have non-contributing lodgers, is that right? A. I don't know of any published. It may be that the (67) Department of Social Services in New York has them.

Q. Do you know? A. I don't know.

Judge Hays: Is that all?

Mrs. Gordon: No, I'm sorry, your Honor, that is not.

Judge Hays: We are always hopeful.

Mrs. Gordon: I'll try my best.

Q. By the way, the median income for poverty as stated on this chart, are Welfare recipients below that median income for poverty or above it, Welfare recipients in the State of New York? A. The median income on this chart is for everybody.

Q. Right. Well, as compared to the median income for poverty, poor people, shown on that chart, does the median income for Welfare recipents go above that or below it, and I mean Welfare recipents throughout the State of New York? A. The chart doesn't show any median income for poverty. It shows what the percentage of people living below the poverty line in 1970 and in 1970 the poverty line for an urban family of four, I think was just around $4,000.

Q. What I think I am really trying to ask you is whether you have any information as to whether or not Welfare families with or without lodgers in the State of New York (68) live below the poverty line as defined in that chart or by some other statistics you have? A. In New York City, because of the higher—well—

Q. First, do you have any information? Let's start with that. A. It's crazy. Let me explain. The Federal poverty line which is really a budgetary decision which is made by the Federal government, is $4,000 in the country for the urban family of four. If it was made for New York, it would have to be higher because the rents are higher. This is the national poverty line.

I think it is true that because of the higher rental costs, in New York City, many families of four get around or a hundred or more above the poverty line. For New York State as a whole I would think that most families of four are below the poverty line, in other words, they don't get $4,000 a year.

Q. You mentioned that in New York in your opinion they would be below some nationally defined poverty line because the rents were higher, right? A. Yes.

Q. To your knowledge, do the Welfare recipients in New York City either by and large or all of them, do they get their actual shelter costs from the Department of Social (69) Services of the State of New York, do they get their actual rent? A. As far as I know, yes.

Q. Now, you indicated on the basis of that chart and your other testimony that it is indeed very likely that poor people have non-related persons living in this household, right? And the poorer you are the more likely you are to have these non-related persons living in the household, is that right? A. By and large they are relatives, you know, members of the extended family but they may also be the unrelated persons, yes.

Q. They may be some distant relative or some non-related person, right. Let's call that for ease of statement doubling up, okay? It might be tripling up or whatever, but let's call it doubling up.

Now, do poor people in your opinion double up, is one of the reasons they double up, because they can live more cheaply in a combined household than they can live independently? A. No, I think—that would be more typical of middle class people. I think poor people double up because they don't have any other alternative. In other words, there isn't enough money to go around.

(70) Judge Hays: That would imply they could live more cheaply by doubling up.

The Witness: They can live more cheaply, but the way the question was presented, you know, it was in order to save money, but what I was trying to say is quite often the doubling up is on the basis of necessity because there simply isn't enough money left to maintain two households.

Q. It is cheaper to maintain one household than it is to maintain two households? A. If you only have one money

for one household it is cheaper, but it is the only alternative.

Q. Who is the person who only has the money for one household in that statement you just gave me? You indicated that you felt that perhaps the fact that certain savings might accrue from maintaining one household rather than maintaining two households—

Mr. Schwartz: I object, your Honor.

Judge Bauman: Just a moment, I didn't understand the witness to say anything like that. I gathered he was suggesting perhaps in middle class double-ups there might be some fat left over, but as I understand him to say rather clearly, that there was no fat at all because there was no way these people who double up were going to survive if they had to live separately.

(71) Do I understand you in substance, correctly?

The Witness: Yes, sir.

Judge Bauman: I haven't heard the slightest suggestion of fat in these low income people.

Mrs. Gordon: I'm sorry, your Honor, I wasn't trying to allude to that. What I want to know is:

Q. If there is a lodger, you know, the person who comes into another person's household, it seems to me by your definition is a person who has no money, is that right, he can't afford to stay by himself, right? A. Right.

Q. That's what I mean. Now, when he goes into this other household, he is, I take it, by your definition, going into the household where the money is, is that right? A. Yes.

Q. By the way, when he comes into that household as in Mrs. D'Alessio's example, where she was three people in that 4-room apartment, however you want to characterize it, before Mr. Mattola came in, and now he comes in and there are four people there, that change from three to four, does

that affect the utilization of the space in that apartment in any way? A. What do you mean, the utilization of space?

Q. If one were to allocate space by fractions where (72) appropriate to that apartment and you were going to do it before Mr. Mattola came in—

Judge Hays: It is obviously that if there are four people in the apartment that they have less space than three people.

Q. That is what I wanted to know from the witness. Would it be fair to say Mrs. D'Alessio—

Judge Bauman: I don't think that's necessarily an area of expertise.

Mrs. Gordon: I want to know whether it is reasonable to say that.

Q. Is it reasonable to say that Mrs. D'Alessio and her two children occupied three-thirds of the apartment before Mr. Mattola came, and that after he came they occupied three-fourths of it? A. I suppose if people were machines you parked in a garage you could play these, you know, make these statistical determinations. I am not competent to talk about Mrs. D'Alessio, she has to talk for herself. Let me say, however, that what happens if an unrelated person comes in a household, what happens is the poor can't afford large apartments or especially the New York area, they get small apartments with small rooms, if they are Welfare, the Welfare Department, this is what the Welfare Department typically offers them so they (73) live in a minimum space to begin with.

When somebody else comes in they becomes more crowded, obviously. But the exchange—they make this sacrifice because again this is a perfect example of obligation of mutual help that I discussed earlier. You make a

sacrifice because then you obligate the other person to help you when you are in need.

Q. You indicated that where appropriate to Mrs. D'Alessio and the two children and Mr. Mattola the space that she described in this court was barely adequate, is that about right, the two bedrooms? A. Yes.

Q. I want to give you one other example:

The record establishes that a Mrs. Hurley, who is the named plaintiff in one of these cases, at the time of the events giving rise to these claims, she lived in a 3-bedroom apartment in Westchester, the living room, kitchen, three bedrooms and a bath. She had three children—

Judge Weinstein: Three bedrooms?

Mr. Gordon: Three bedrooms and bath and living room. The kitchen area had a dining area for that matter. She had three children and she lived at this point with her paramour who shared her bedroom.

Q. Is the space in that apartment adequate for (74) that family or pardon me, not that family, the Hurleys and the paramour? A. I think it depends on the size of the rooms, the age of the children, various other factors. You can't simply say three bedrooms is adequate or inadequate.

Q. Well, let's assume—the record does not establish the exact size of the room but I think it is a fair inference that if Mrs. Hurley were living in rooms that were 5x6 she probably would have said that in her papers, so I think that we can assume they are—

Mr. Schwartz: Your Honor, I object to what is a fair inference, counsel is asking the—

Judge Bauman: What does the record disclose? Why should we assume each of the rooms is 13x20 or any other area?

Mrs. Gordon: Okay, I think that's all.

Judge Hays: All right, you may step down.

Mr. Schwartz: No further questions.

Judge Hays: We will take a five-minute recess.

(Recess taken.)

Mr. Schwartz: May we recall Dr. Gans for one final question?

Judge Hays: All right.

(75) Redirect Examination by Mr. Schwartz:

Q. Dr. Gans, in your opinion, what would be the effect on the relationship between the public assistance family and this lodger if the Welfare Department reduces the grant because of his presence? A. One possible consequence is that the lodger might be asked to pay the rent and I am not talking about your cases, but I am talking generally what happens in the poor community.

Quite often the relationship between men and women is a very fragile one, particularly when the men are, you know, are economically marginal in society and told that they are not useful economically, (a) the men don't have much money, (b) their egos are very sensitive and they might just say well, if you ask me to pay I will just move out on you and that would be the end of—in essence, the relationship would be sacrificed to whatever the rental money was.

The lodger, if the lodger is a man who is living with a woman, he becomes a lodger to serve a variety of functions in the family, helping raise the children, taking care of the house, I think the relationships are such that if the woman asked him for money, in most cases he doesn't have it, even if he had it he might say well, if you put it on that basis, I will just move out and then the woman is deprived of (76) the relationship with the man which is part of life and of the fatherly functions that this kind of lodger often performs.

Mr. Schwartz: That you.

Recross Examination by Mrs. Gordon:

Q. Is there anything in the regulations we are concerned with that is 352.30(d) and 352.31(a)(3)(IV) of the State Code of Rules and Regulations, anything in those regulations that prevents a poor lodger from obtaining a shelter allowance from his local county Department of Social Services and anything that prevents him from getting a basic grant?

Mr. Schwartz: Your Honor, I object. What's in defendant's own regulations is not a question to ask an expert in planning and sociology. The regulations speak for themselves.

Mrs. Gordon: I am asking him whether in his opinion there is anything in the content of those regulations that would prevent the poor lodger who you were talking about, the person who has no money to live separately, and comes in and shares a friend's apartment, is there anything that prevents him from getting a shelter allowance equal to his share and a basic grant in the regulations we are talking about?

Judge Hays: I don't think that's a proper question for Dr. Gans. It seems to me perfectly obvious there (77) is nothing in the regulations that prevents this man from getting an allowance, and Mrs. D'Alessio said in the case of her lodger he didn't want to associate himself with welfare, and he didn't have the allowance for that reason.

There wasn't any claim there was anything in the regulations that prevented it.

Judge Bauman: Are you suggesting it ought to be the public policy of the State of New York to encourage those people who are resisting going on

Welfare to go on Welfare, is that the point of your questions?

Mrs. Gordon: No, not at all, your Honor.

Thank you.

(Witness excused.)

Mr. Schwartz: Your Honor, plaintiffs call Paul Davidoff.

Judge Hays: This material that Dr. Gans testified to seems to me material that should have been agreed to by the parties so we shouldn't have to listen to it, so make it very brief.

Mr. Schwartz: Your Honor, I think as the cross examination indicates there is far from an agreement between the parties as to the cause of the relaship between the recipient and the lodger and the effect of the reduction in the grant.

(78) Judge Hays: Go ahead.

PAUL DAVIDOFF, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

> Mr. Schwartz: Your Honor, I will apologize sincerely for no having a resumé available, but I will try to keep the qualification questions as short as possible and submit a resumé to the Court and my adversary.

Direct Examination by Mr. Schwartz:

Q. Where do you reside, Mr. Davidoff? A. 18 Forest Park Avenue, Larchmont, New York.

Q. How long have you resided in New York? A. Nine years.

Q. What is your profession? A. I am an urban planner.

Q. Will you tell the Court what an urban planner does? A. An urban planner is concerned with the process of determining appropriate objectives and appropriate means of achieving those objectives so as to solve or mitigate the basic problems confronting urban communities seeking—he seeks in his plans to find ways to expand the opportunities of the citizens who reside within the urban community of which he works.

(79) Q. Have you studied urban planning? A. I have received a masters degree of urban planning from the University of Pennsylvania.

Q. Have you taught in your field? A. I have. I was a professor of urban plarning at the University of Pennsylvania from 1956 to 1965 and was then professor of urban planning and chairman of the graduate department of urban planning at Hunter College of the City Univerity of New York.

Q. Have you done any planning work for any government agencies or any consulting work for any consulting agencies or municipalities? A. Yes, I have. I have been a town planner in the town of New Canaan, Connecticut, I have been a senior planner on the program of rewriting the zoning resolution of New York City back in the late 1950's, I have worked briefly with the New York City Planning Commission, I have been consultant to the President's Commission on Urban Housing, the Keiser Commission and the President's Commission on urban problems, the Douglas Commission, I have done special consulting work for the United States Commission on Civil Rights.

Q. Are you a member of any professional organizations? A. I am a member of the American Institute of Planners.

Q. What is your present position? (80) A. I am director of the Suburban Action Institute.

Q. Will you tell the Court what the Surburban Action Institute is, what its functions are, what its activities are? A. Yes. The Suburban Action is a non-profit agency

foundation sponsored in the main whose objective is to seek out opportunities for minority families, families of low and moderate income in the suburbs and particularly within the tri-state New York region.

Q. Have you and the Institute or you or the Institute engaged in a study of housing, specifically with respect to low income persons and Welfare recipents? A. The major part of our work is concerned with the locational opportunities and housing opportunities of families of very moderate income and included in that had been our concern for housing for Welfare recipients.

Q. In all of your various activities and study, have you studied the problems—not the problems, but have you studied the housing supply and the conditions of the housing supply and the rental market for low income persons in New York State? A. I have. It has been a basic part of my work. I have published a volume on the housing for New York State.

Q. Did that volume include an analysis of Welfare (81) recipients in housing? A. It did.

Q. Have you also studied and analyzed problems of overcrowding and space requirements? A. Yes, I have.

Q. Finally, have you also studied the various living arrangements for the various income levels? A. I have.

Mr. Schwartz: At this point we would ask Mr. Davidoff to be declared an expert witness in the areas of urban planning and housing.

Judge Hays: We will consider him qualified as an expert.

Q. Can you tell us whether you have made any specific analysis for the purpose of this case? A. I have reviewed a great deal of literature on the housing conditions of Welfare recipients in New York, in preparing for this testimony.

Q. In particular, have you consulted the 1970 census there? A. I have.

Q. Before we ask for your opinions on a number of questions, we are wondering if you could help the Court with some definitions. First, would you tell the Court what is (82) meant by the term "Vacancy Rate" and what standard is used, if there is a standard, to determine whether this rate is high or low. A. A vacancy rate refers to housing units or dwelling units which are not occupied, and which are available for rent, and the generally accepted standard of determining whether there is an adequate vacancy rate is now pinned at approximately 4% of the housing stock being vacant and available for purchase or for rent.

Q. Does the standard differ with respect to low income families? A. As to the 4% figures, no. That would be the figure in the housing market for low income families.

Q. Is there a standard definition of adequate space or overcrowding that urban planners use? A. There are a series of standards. It's a field of relative judgment. The census defines overcrowding as being more than one person per room. There have been determinations by the American Public Health Association of what adequate space standards would be. Professor Gans alluded to some older standards that they have employed, and I believe that they are now reissuing those standards. There are standards that have been examined for bare survival.

Architects and planners have established what you (83) might call Calcutta standards, what does it take for a family to breathe and to sleep? A bare minimum for purposes of health. But in our society, we have generally sought to establish standards that are above that, far beyond what is required for bare survival, but to try to create an amenable environment in which to reside, in which to find some privacy of family life.

The FHA, the various housing finance agencies around

the nation have established minimums. The Housing Authority of New York City has established minimum standards for space.

Q. Will you tell the Court what those standards are, if you know? A. They are very broad and they are not easy to define because they vary by room size, number of rooms per unit, the Housing Authority have suggested that in a one-bedroom unit something in the neighborhood of I believe it is in a range between 550 to 600 feet might be a minimum unit, and for a 2-bedroom unit either 720 to 750 feet.

Another measure that the Housing Authority here uses would be a first bedroom of something in the neighborhood of I think 140 to 150 square feet and a second bedroom of about 110 to 120 square feet.

Q. Is there a standard definition that urban planners (84) use to determine the percentage of rent to income that a family should expend on rent? A. Well, the figure that is generally employed today is a rather high ratio of rent to total income. It is 25%. It is assumed that a family normally cannot sustain its other needs if it is paying above 25% of its income for rent.

Planners and people in the field of housing have for a long time argued that that figure should be reduced to 20%, that almost all families earning above the median income pay less, well under 20% of their income for rent and that a more normal figure, allowing for adequate disposition to meet needs of other requirements for family living would pin it at 20%, but today, the figure is generally accepted in the law at 25%.

Q. Is there a generally accepted definition of standard housing? A. Well, again, there is a series of definitions that might be employed. One minimum definition is housing that comports with all the police power regulations determining the adequacies of a unit, in terms of health and

safety features, the existence of plumbing facilities within the unit, the non-existence of overcrowding within the unit. Those are a start.

More recently in a recent study published at (85) Harvard and MIT analyzing housing needs for the nation the question of overpayment has entered into the definition of standard housing which I think it properly belongs there, that is, payment above 25% income for rent reduces the dwelling unit to a substandard category not physically, but for the inhabitant of that unit and still further and not as yet well accepted standard but again as an expert I felt is a necessary condition to the appraisal of housing would be the environment surrounding the housing unit, that the space standards in one location might be offset by the openness surrounding the unit, the quality of the environment, whereas, in another situation an ample amount of space in a highly polluted area could not qualify as standard housing.

Q. As an expert witness, in view of your study and activities, would you give us your opinion as to the present supply of housing in New York State and the general condition of this supply? A. I think it has been recognized by people in the field of urban development and housing that for years the housing supply in New York State has been inadequate to meet the needs of the growing population of the State and in particular to meet the needs of families of low and moderate and increasingly middle income in the State, and that the stock has been inadequate to serve well the needs of minority (86) families, blacks and other non-whites.

This has been recognized in the prefaces to the various laws that have been adopted by the state since the middle '30s, a statement of acute housing need that persists within the state and seems to be incapable of being solved under present means.

Q. What are the factors that have contributed to this

inadequate supply of housing, particularly with respect to low income families? A. I think there are a combination of factors. Housing in our society is primarily the building of houses, the maintenance is primarily a private function, and the private market in housing has supplied in inadequate amount a number of dwelling units that rent or sell in the range that can be met by families of low income, the private market through the passage of used housing into hands of successive users does provide a supply of used housing for families who cannot afford the private housing being constructed for rental or sales, but by the time much of that housing passes through the many users and becomes available to families of low income, that housing is very often in substandard condition, below modern standards in terms of its health and its safety, its general environmental conditions and its rents are very high, so an abnormally high proportion of low income families (87) pay above 25% of their income for such housing.

The second component of housing at least since the '30s, has been the public. The public through investment in new housing, through special guarantees and insurances to assist the private market through special tax incentives, aiding individual families in terms of their ability to write off certain costs of housing, has assisted very greatly in increasing the supply of housing available to meet the needs of low income families, but here too, the role of the public has been greatly limited in terms of the desire to achieve safe housing for all families.

We are far, far behind the goals that have been set in various housing acts for meeting the needs of low income families. Congress in 1949 promised a decent home and a suitable living environment for every American family and there is a question as to whether the nation has made steady progress or not toward that.

In 1968 the Congress adopted a new housing act that

spoke of a goal of 26,000,000 new housing units being constructed over a ten-year period, and would be tens of thousands of units being constructed for families of low income. And while for a short period in the early 1970s, during the heyday of what was known as the 236 and 235 Housing Assistance Program, we began producing almost an adequate supply relative (88) to the goal, generally we have been far below the goal as a nation that had been set to meet the housing needs and in the past two years it has become a national disaster, there is a moratorium established by the executive on housing expenditures, very limited funds available for housing to meet the needs of low income families and the overall housing production of the nation has sunk to a terribly low position as of the last report in May.

So that we are far behind as a nation and as a state and in the particular counties of the state in meeting the goals that have been established for housing.

Q. What is the projection for the future? Do the experts have an opinion on whether the situation is likely to improve or get worse? A. By nature, planners are optimistic. They think by doing something you can improve something, so one hopes that we will at some time in the future begin to achieve levels of standards necessary in housing that have been achieved by many nations in Western Europe that have been troubling to us by our nation's relative indifference to housing conditions.

But as I view the near future, I see it as one in which it seems there is very little likelihood that families of low and moderate, and as I said before even (89) middle income will find their housing needs well met within standard housing.

Q. Give us your opinion as to whether there are any problems of overcrowding in New York State, particularly for low income persons. A. There are immense problems of overcrowding. I don't know if you wish for me to read

some of these findings of various public studies of Welfare recipients and Welfare conditions, but the findings of these organized studies have indicated that Welfare families live disproportionately in the worst housing in the most overcrowded housing in housing that is of exceptionally high rent relative to income abilities.

I have with me here data on the census of 1970 for the metropolitan area which indicates I think 78% of families earning under $5,000 are paying above 25% of their income for housing.

Judge Weinstein: Excuse me, we can take judicial notice of all that and counsel can supply it to us so we don't have to take your time.

Q. Will you give us your opinion as to the extent, if any, that landlords refuse to rent to Welfare recipients because of a person's status as a Welfare recipient? A. The studies that I have read and the interviews (90) I have conducted indicate there is great discrimination against Welfare recipients, that many landlords refuse to rent to Welfare recipients.

Q. And what effect would this have on the availability of housing for the poor? A. I think there is a very short supply of decent housing available to begin with and that with that added level, it is a second degree of segregation. It is a second level of income and second degree of segregation because of the Welfare condition which restricts Welfare tenants to a very small and often ghettoized market of housing.

Q. Mr. Davidoff, I show you Plaintiff's Exhibit L which is already in the record, and which consists of the Westchester County Department of Social Services' rent schedule. As I say, it is already in the record so I will not trouble the Court by moving its admission into evidence.

In your opinion, Mr. Davidoff, is there a sufficient supply of standard housing for Welfare recipients within these rental limitations? A. No, there is not.

Q. Would you give us the basis of your conclusion? A. Studies of reports made on housing conditions by the Westchester Planning Commission and consultants' reports to the Westchester Planning Commission. My own observation (91) in my own work reviewing the housing conditions of Welfare recipients in a number of the cities of Westchester and Mount Vernon, New Rochelle and Portchester, reveal that the housing stock available is shockingly poor in condition and is substandard in large measure.

There is very little housing available for rented standard conditions at the rents shown on this table.

Q. Similarly, I show you a schedule entitled "Nassau County Department of Social Services, Maximum Shelter Schedules Plaintiff's Exhibit M, and it is already in the record.

Also, with respect to this schedule, would you give us your opinion as to whether there is sufficient supply of standard housing for Welfare recipients? A. Again, from my reading of reports issued in Nassau County by the County Planning Commission as well as again observations personally made in Westchester, I would say that there is a very restricted market of standard housing available in Nassau County at these rents. A very limited amount.

Q. I also show you Plaintiff's Exhibit N, which is a schedule of shelter allowances for New York City.

Judge Weinstein: N?

Mr. Schwartz: Yes. I don't believe this schedule is already in the record and therefore I would move for its admission.

(92) Mrs. Gordon: Your Honor, Mr. Schwartz, if I just may note, the defendants distributed to the panel their Exhibit DXB in evidence which has all the shelter schedules for all the counties.

Mr. Schwartz: In view of Mrs. Gordon's statement, I will withdraw the motion to move the schedule into evidence.

Q. Mr. Davidoff, in your opinion, is there a sufficient supply of standard housing to meet the needs of Welfare recipients in New York City within these rental limitations? A. No, there is not. The various studies that I allude to earlier that I have been reading, in particular to Welfare housing conditions in New York City indicate the very great amount of substandard housing occupied by Welfare recipients in the City and I think a major reason for that is the absence of standard housing at rents that comport with these standards.

Q. Mr. Davidoff, are you familiar with the term "lodger" as that term is used in the regulations involved in this case? A. I am.

Q. And are you familiar with the living arrangements of the plaintiffs in this case referring to the class of plaintiffs rather than any particular plaintiffs? A. In general, I believe I am.

(93) Q. In your opinion, are the living arrangements of the plaintiffs in this case, again referring to the class of plaintiffs, more prevalent among low income persons and Welfare recipients than the other income groups? A. I believe that they are.

Q. Would you give us the basis of this conclusion? A. Well, Dr. Gans was my instructor, and much of my knowledge of sociology in the field of planning, and I think he has stated it quite eloquently today, and the many facets of it, force this type of occupancy, and this form of relationship among the families of low income.

Q. Let us assume a rather or relatively complex set of facts. Let us assume that we have a mother who resides with her two daughters who are each approximately 10

years of age, the family, mother and two daughters are recipients of aid to dependent children type of assistance.

This family has two bedrooms, they have a living room, they have a kitchen, and they have a small room in which they keep their refrigerator.

Let me give you the dimensions of these rooms:

One bedroom is 12 x 15, one is 8 x 10, one living room is 12 x 11, the kitchen is 9 x 13½, and the room for the refrigerator is 5 x 6.

The mother resides in the larger bedroom. The (94) two children reside in the other bedroom. And the apartment they rent costs the family $175 per month and the Welfare Department provides a shelter allowance of $175 per month, and a total public assistance grant of approximately $340 per month.

The family has no other source of income. At some point in time, a male friend moves into the home, this male makes no financial contribution to the family. On the basis of this male friend's presence, the Department of Social Services reduces the grant by approximately $44 per month, because the friend is residing in the home.

The friend shares a double bed in the mother's bedroom. Based on these assumed facts, would you give the Court your opinion as to the following:

First, when the male friend did not reside in the home prior to his entry, would you say that the family had adequate space? A. I have tried quickly to multiply. I come up with a figure of—do you have the total figure of space, I think it comes up about 560 or some square feet?

Q. It was a figure in that vicinity. A. In that vicinity.

And I would say that such a unit is far below a modern standard for decent accommodations for a family of (95) that size. My understanding of the standard employed by the New York City Housing Authority, which certainly is not luxurious in its use of space, but rather tight in its

provision of space, is that that unit would be over 100 square feet below what they might deem appropriate for a two-bedroom unit and take the second bedroom, is shockingly small, an 8 x 10 unit would be considerably below what their standard would be for a second bedroom which is a very small room in and of itself.

So that I would say that is a very small substandard unit, if they occupied it by themselves.

Q. In view of the first answer, I hesitate to ask the question.

When the male friend did not reside in the home, did the family have excess space? A. No, there was no excess space by contemporary standards.

Q. The fact that the mother is now sharing a bedroom with this male friend, in your opinion, does this mean there was excess space before the male friend moved into the home? A. No.

Q. Does it mean that the mother and her two daughters have excess space now that the male friend is in the home? A. No. It hasn't created more space. There was inadequate space before he came in and that space remains (96) more inadequate today.

Q. Do you have an opinion as to what the effect of a $44 reduction in this family's grant would be on this family? A. I was trying to work it out as you were reading the numbers. If you have a base rent of $175 and then a total grant of $340, so that that leaves—what is it—$165 for non-rent purposes.

Q. That's approximately correct. A. $165 and you reduce that by $44, you have approximately $120 a month or what does that come out to a year, $1200 and—$1450 a year. To me, everything but rent to meet food, clothing, health, one hesitates to think about recreation, leisure and the amenities. I don't know how one can manage on the other items. It's abusive. It is difficult for families with considerably more income for that family size to get on, one

can't imagine how it is done. It is a level of survival as Dr. Gans talked about of just trying to manage, to barely survive.

Mr. Schwartz: I have no further questions, your Honor.

Judge Weinstein: Before we get to those questions, my notes indicate that the witness said at one point 179 rent, at one point 175. Which is right?

(97) Mrs. Gordon: Shelter allowance of 179. Our record, the record of the case, indicates 175. I will be glad to take the witness' word for the fact she is getting 179.

Judge Weinstein: All right.

Mrs. Gordon: It may have been increased since the last papers were filed.

Judge Bauman: Perhaps I am wrong, but I understood the allowance to be 179 and the rent to be 175. Am I mistaken about that? That's what I understood her to say.

Judge Hays: Is it possible that the allowance includes heat or lights or some such thing as that?

Mrs. Gordon: This is Mrs. D'Alessio we are talking about? Her shelter allowance includes heat. There is another applicant in this case whose shelter allowance doesn't include heat, she gets a separate one, but as to Mrs. Clark's, I'm afraid, my recollection is the allowance was 179 and certainly the allowance could not be higher than the actual rent.

Judge Bauman: All right.

Cross Examination by Mrs. Gordon:

Q. Is it Dr. Davidoff? A. Mister.

(98) Q. Mr. Davidoff, in your long list of eminent qualifications, I omitted to note down where you are presently working; what do you presently do? A. I am director of

Suburban Action Institute which is located in Yonkers, New York.

Q. I take it from your testimony the work of that is general, it is not confined to Westchester or New York State? A. It is primarily confined to the tri-state area with some contractual work to the State of Pennsylvania as well.

Q. Is it preeminently concerned with suburban housing as opposed to city housing or suburan planning as opposed to city planning? A. No, it joins the two. Its reason for existence is our belief that the cities of America cannot by themselves solve their disparate housing problems, that the suburbs must contribute the available lands that they have and the growing jobs they have to solve the urban problem. So, our concern is with the wellbeing particularly of families in the city who we feel cannot be adequately satisfied with their needs of opportunities in the city, so I would say our concern is with the entire metropolitan region.

Q. The metropolitan region including its surrounding (99) suburbs? A. That's right.

Q. Assume, would you, that we have a public assistance unit already living in an apartment, they are not looking for an apartment, they are already living in an apartment and we want to, for certain purposes, determine what share of the rent or what share of the shelter allowance for the unit is attributable to the members of that unit.

Could you tell me how the vacancy rate effects how those rental shares would be allocated if it does? A. It goes back to the very basic beginning of what the rent schedule will be to satisfy all Welfare recipients in standard housing so that the knowledge of the fact that the vacancy rate is now not 4% but somewhere like 2% and for low income families, 1%, suggests to those who have studied the issue that the rents are going to be relatively high for housing for families who will be Welfare recipients so the knowledge of that vacancy rent would be very important in es-

tablishing the rent schedule so that standard housing could be determined for those who would receive it.

Q. I think you misunderstood me.

I have an example here of a public assistance unit of several members who are already living in an apartment, they don't want to move. Their rent is fixed. Okay? For the (100) moment now it is fixed, and all I want to do is allocate shares of that rent to individuals living in that house.

Now, I want to know from you whether or not the vacancy rate in the community that they are living affects in any way how I should allocate those shares on the basis of a fixed rent in a subsisting unit. A. I suppose what I was saying is those earlier questions would have conditioned your thinking in terms of the specific questions you asked.

I don't see it that the vacancy rate per se to that particular unit has a response.

Q. Would it be relevant? A. It is relevant. I explained that in my earlier answer. It must be looking at the issues of an appropriate rent.

Q. I am not looking at the issue of an appropriate rent. I am taking a particular rent and dividing it among a particular number of people. Is it relevant to my division of the fixed rent among the given number of people? A. I am saying the knowledge of that effect of the vacancy rate on rents generally will fix what can be allocated to rent but once you have done that and made that determination then within that very narrow area you define it. No, I don't see the relationship.

(101) Q. Now, does a—in your opinion, would a regulation that prorates rent, a shelter allowance which is either equal to rent or perhaps somewhat less than rent—would that—prorates it between the members of a public assistance unit and a lodger who doesn't contribute and takes off that lodger's share, would such a regulation contribute to overcrowding in Welfare housing? A. Let me see if I understand the question.

Would the regulation as it is now which reduces—

Q. Right. Reduces the shelter allowance upon the presence of a non-contributing lodger. Does that regulation affect over-crowding in Welfare housing? A. It is conceivable that it might. I think that would take a study of the available housing market and what the choices and consequences would be with or without that regulation in terms of how families managed or families and individuals managed taking into account what Dr. Gans said of the proclivities of families of low income to try to find a level of survival.

I can't answer it simply.

Q. You haven't expressed an opinion. A. I think I would want to study the consequences of with and without to understand what would happen.

Judge Bauman: Let me ask you this:

(102) A question has been put to you. If a person's allowance has been cut by "X" percent and the expenses of running that house are to remain constant, then that money has got to be cut out of something else, it can either be cut out of the rent which would mean that the family unit would have to move to a much smaller place commensurate with the then existing family which again presumably will be cut if the man continued to live in the house, so to the extent that it might result in the rent budget being diminished in the family unit it could contribute to overcrowding, couldn't it?

The Witness: It could contribute very significantly in that set of circumstances.

Q. Now, in the example that I gave you with respect to housing availability, the vacancy rate, we had this public assistance unit living in a preexisting apartment, we take them as we find them in that apartment, whether it's good

—whether it is standard, substandard or above standard.

Now, upon the entrance of that lodger and the proration of the shelter allowance to exclude his pro rata share, what effect does that have, if any, on the quality of the housing that the recipients are living in, to wit, that apartment? A. I think the Judge's previous question suggested ways in which that chain of events could force removal from (103) those quarters into something less, in lesser condition than those.

Q. Let's just start with the apartment that we have.

Judge Bauman: Excuse me for interrupting but let me pursue that because it troubles me.

In the example that I gave, if the family decided that three people just needed all the luxury that is inherent in their own rental allowance and decided they were going to cut down on the size of their living quarters, and the man decided he was going to stay, presumably the rental allowance would again be diminished until they moved into a postage stamp, so I ask you ma'am, does that cut in the rental allowance have anything to do with the excess amount of housing or is it punitive for the relationship that is being undertaken by the man and the woman living together?

Mrs. Gordon: To answer the first point, your Honor, it is not punitive in our opinion.

To answer the second point, in terms of what you say,—to take it from I think perhaps an affirmative point of view. If you have an apartment with either a rent or a shelter allowance, and the recipient unit is living there and the lodger comes in, a share of that rent is cut out. If they then say, gee, if we move to a smaller apartment, maybe we will do better, the regulation comes into play again (104) and a share of the smaller apartment is taken away.

In that statement, you are absolutely correct, your Honor.

But the point is that the rent and the shares of the rent and that which you are taking away reflects that share that belongs to the lodger. The shares of the premises. If they live in a chicken coop—

Judge Buman: It comes down to one-third of nothing.

Mrs. Gordon: If they live in a chicken coop it would be a prorated share of the chicken coop. The point is there are other devices available to Social Services to prevent Welfare recipients from living in such circumstances, including taking away the children, and while Social Services believe that the family is living in adequate space, it leaves the choice of the meretricious relationship, which you point out, to the Welfare recipient, it doesn't interfere with her meretricious relationship, the State takes no position for or against.

Judge Bauman: I have two words for you, ma'am:

Some choice.

Mrs. Gordon: If the man came and applied for assistance, your Honor, and he wanted to live with Mrs. Hurley or Mrs. D'Alessio, the State and the locals would say (105) nothing about it. We don't require them to get married, we want to know that the person who is getting the benefit of a shelter allowance is in fact a needy person, and the only way we can know that is by having him come before us and demonstrating his need.

Once he demontrates that need, we don't care if he has a common law relationship with Mrs. Hurley or Mrs. D'Alessio and we don't care if instead of a male lodger it's her son or anyone else.

Judge Bauman: I don't want to extend the discussion. We will do it during the legal argument, however.

Q. I'm sorry, just listening to the example of Mrs. D'Alessio and her apartment which you indicated you felt didn't have enough space or Mrs. Hurley and her apartment, in your example, quality of the housing is established prior to the entry of the lodger, is it not, in other words, Mrs. Hurley is living in "X" apartment as was Mrs. D'Alessio and that apartment is either in your opinion standard, substandard or above standard, right, is that correct? A. Prior to the lodger?

Q. Before moving out if she indeed chooses to move out. A. Right.

Q. But the fact that the lodger comes into that (106) apartment doesn't change its quality, is that correct? A. No, it doesn't. It was substandard space for her family at an earlier stage and it remains that way.

Q. And that continues to be your opinion notwithstanding Professor Gans' testimony that it was barely adequate. Professor Gans testified here today that the space in Mrs. D'Alessio's apartment was I believe, he used the words "barely adequate." A. If you use the Calcutta judgment of just survival for health, if you use the bare minimum set up by the New York City Housing Authority, it is substandard. There are a range of choices you can make. I think that is substandard living condition, I think to know a little bit more, we want to know about the surrounding environment.

Q. The New York City Housing Authority standard that you are talking about, is that—does that standard pertain to— A. Two-bedroom units.

Q. Does it pertain to housing under the jurisdiction of the New York Housing Authority? A. Yes, housing that they are building and I am using that as a standard, a

modern standard of what a unit should contain in space for a family of low income.

Q. In other words, in establishing a standard they (107) are essentially building housing to conform to that standard in 1974, is that right? A. That's right.

Q. The Housing Authority did not purport to build nor establish a standard for old law tenements in New York City for example, is that correct? A. No, except they have housing programs and established standards to determine the eligibility of those and what they have done to modify those to make them liveable.

Q. Now, you commented on the fact when counsel showed you the Westchester County rent schedule which is Exhibit DX-B in evidence, you said you didn't think there was an adequate supply of housing available in Westchester County within those maximums, right? A. Right.

Q. Now, you were aware when you said that that Mrs. D'Alessio had an apartment which you acknowledgely considered inadequate but had an apartment where the rent was below or equivalent to that maximum, in other words, she had an apartment within the confines of the schedule. A. That's right.

Q. Now, were you also aware of the fact that Mrs. Hurley had a three-bedroom apartment also within the confines of (108) that schedule and indeed below it, below the maximum? A. Yes.

Q. Are you also aware of the fact that exceptions—exceptions in terms of the payment of the maximum allowances are made in Westchester, in Nassau, and indeed statewide? A. I am.

Mr. Schwartz: I object to the question. It has not been established on the record that any exceptions are granted from the schedule.

Judge Hays: Was that established?

Judge Weinstein: It's on the record.

Mr. Schwartz: It's a whole complicated problem. I would concede to the Court that exceptions in fact are granted in Westchester County but in depositions that we took in another action in this court, those depositions established clearly that the exceptions are quite the exception and it is quite limited and that schedule exists for a specific purpose and that is to keep the rent within the specific limit.

Judge Weinstein: You go ahead.

Mrs. Gordon: Thank you.

Q. Are you aware of the following fact that 93% of the Welfare caseload in the entire State of New York receives shelter allowances equivalent to their actual rents? (109) A. I am not.

Judge Hays: What happens to the other 7%

Mrs. Gordon: The other 7%, your Honor, it is essentially a Dandridge versus Williams, Rosado versus Wyman problem, the other 7% or approximately 7% have rent in excess of the shelter allowances they are paid, just as in a situation where you have a basic grant, one could find that the needs of a family would be let's say $100 a month and accordingly under Dandridge, one could pay as the basic grant something less than that 100% of standard of need and the shelter allowance situation as to the other 7%, they get less than the actual cost of their rent or less than 100% of their need.

Judge Hays: I wonder if you could speed up your question. I'd like to adjourn for lunch.

Q. If a four person public assistance unit lives in a given housing unit, is it fair to say that the use of that premises, the housing unit is allocable to four persons? A. Yes.

Q. If a fifth person moves in, is it fair to say that the use of that premises has now changed and is fairly allocable to five persons? A. Yes.

Q. If one were going to allocate the cost of a given premises among the numbers of people living there, would it (110) be reasonable to say that you could do it in the first instance by fourths and in the second instance by fifths? A. No, it would depend upon the relationship among the parties.

Q. If it was a man and wife, if it were a man and wife you might say, would you not, that the husband was responsible for paying her share and therefore you can allocate to him 100%? A. Or vice-versa.

Q. Yes, that's quite right.

However, if the individuals are not legally responsible to support each other, is it fair to make an allocation of cost based on an allocation of use of space? A. I think that's a private determination as it is between a husband and wife. Do they each put half of their wages or what into the rent, does one pay it all? I think it is a private relationship amongst the occupiers of the space as to how it would be allocated, as long as the rent is paid.

Q. In other words, you think it would be unreasonable if I wanted to use some allocation measure to allocate the cost by the number of people using the space, would that be unreasonable? A. It might or might not, depending upon the determination made by the occupants of the unit. I think they (111) are the ones who would determine how they would allocate that responsibility.

Q. In other words, you would leave the whole question to people who were living there? A. I think that would be perfect.

Q. Would you take the same position as Professor Gans, for example, with respect to Mrs. Hurley, that with her three-bedroom apartment, with the living room and the

kitchen, bath, and her three children herself and her lodger, that you would not care to assess whether or not she had adequate space unless you knew the size of the rooms? A. I'd have to know the size of the rooms to do that.

Mrs. Gordon: I think that's all, your Honors.

Mr. Schwartz: I have one final question, your Honor.

Redirect Examination by Mr. Schwartz:

Q. In your opinion, Mr. Davidoff, is it likely that the families in the plaintiff class who reside with lodgers have excess space? A. It is highly unlikely from my reading of the studies of the conditions of Welfare recipients.

Mr. Schwartz: I have no further questions.

(112) Mrs. Gordon: Excuse me, I did have one further question.

Recross Examination by Mrs. Gordon:

Q. You mentioned that—commented on, the Nassau County schedule. You mentioned that you were familiar with Nassau. In your opinion in Nassau, do you know whether Nassau has a low vacancy rate? A. 4,000 for families of low income?

Q. Yes. A. It is my belief it is a low vacancy rate.

Q. Now, is it logical to assume that in a low vacancy rate you would find lots of Welfare families living in temporary housing such as Welfare hotels and motels? A. That seems to be a practice.

Q. It would seem to generate that kind of— A. That's right.

Q. Do you know how many or what proportion of the

Nassau County caseload lives in such temporary type of housing as of the present time? A. I have seen the figure, but I don't have it with me. I don't know.

Mrs. Gordon: That's all.

(113) Judge Hays: You may be excused.

(Witness excused.)

Judge Hays: The Court will adjourn until 3:00.

Mrs. Gordon: Your Honor, could I just get a clarification. In preparing for this hearing, I had advised Mr. Schwartz that I thought it might be preferable on defendant's case to prepare affidavits for our people in lieu of direct testimony and that he could then cross examine and that I might redirect, and Mr. Schwartz agreed to that.

We have two affidavits which have already been distributed. We have one of the witnesses here, a Mrs. Harmon. The other witness, a Mr. Raklan from Nassau County would not be here and accordingly, Mr. Schwartz and I agreed that I would permit him to take a deposition at his convenience, immediately subsequent to this hearing, as soon as we could get Mr. Raklan in lieu of his testimony in open Court.

For the same reasons, or to convenience Mrs. Hurley, Mr. Schwartz and I also agreed that in the event the case worker took the stand in the Hurley matter, Mr. Schwartz would be permitted to take a deposition of Mrs. Hurley with my cross examining her along the lines of the situation with Mr. Raklan.

Now I would like to know if that procedure is satisfactory to the Court.

(114) Judge Hays: Well, how long is it going to take you to accomplish all these things?

Mrs. Gordon: We can do it almost immediately. We can probably do it tomorrow morning and get expedited transcript.

Mr. Schwartz: We can't be ready tomorrow morning. We have not seen the affidavits.

Mrs. Gordon: They have been distributed.

Judge Hays: Can you have everything done in one week?

Mrs. Gordon: Yes, your Honor.

Mr. Schwartz: Yes, your Honor.

Mrs. Gordon: I think that will expedite the hearing today.

(Luncheon recess.)

(115) Afternoon Session

2:30 p.m.

(Trial resumed.)

Judge Hays: Does that conclude your presentation?

Mr. Schwartz: Yes, your Honor.

The plaintiffs rest subject to their right to take the depositions as agreed upon.

On cross examination, if it may please the Court, Mr. Kahn will handle the cross examination of one of the defendants' witnesses, and Mr. Clark will handle the cross examination of the other.

Judge Hays: All right.

Will the State proceed.

Mrs. Gordon: Yes, your Honor.

Quite frankly, your Honors, I do not know whether it is appropriate to interpose a motion to dismiss for failure to make out a prima facie case in this proceeding. If it is, let me—

Judge Hays: Let us assume you have done so, and we will deny it.

Mrs. Gordon: Thank you.

The defendants call Linda Harmon. Mrs. Harmon. And as we have noted, Mrs. Harmon has submitted an affidavit which has previously been distributed to the members of the (116) panel, and accordingly, I will sit down and let Mr. Schwartz cross examine.

LINDA HARMON, called as a witness, being first duly sworn, testified as follows:

Cross Examination by Mr. Clark:

Judge Hays: Keep your voice up, please, Mrs. Harmon.

The Witness: Okay.

Q. Mrs. Harmon, you, of course, signed this affidavit and you are familiar with the information that is contained therein? A. Yes, I am.

Judge Weinstein: Excuse me, just so I can get this before me. Where is that affidavit? Is it among the other papers?

Mrs. Gordon: Yes, your Honor. There were two folders distributed. This affidavit is in a folder entitled "Proceedings Subsequent to Remand".

Judge Weinstein: I have it. Thank you.

Q. Now, calling your attention specifically to the third paragraph of that affidavit, Mrs. Harmon, you indicate a belief of the Department that its current shelter policies make sufficient funds available to public assistance (117) recipients for them to obtain adequate housing to the extent it is available.

Is that based upon some study or survey undertaken by the Department? A. We have undertaken several studies, the Department has, one in '71 and one in '72, and we have just completed one in '74. And as was indicated earlier, the '74 study, we found that 93% of the recipients were receiving the same allowance as they were paying for shelter which would mean that they were able to secure housing in the community and adequate to the extent that it was available.

Q. Mrs. Harmon, do you know how that study was undertaken, how that information was arrived at? A. Yes, I do.

Q. Can you tell me, please? A. Briefly, it was done—it was a sample of ADC cases in all districts in New York State, all Social Services Districts, and we gathered information on the rent actually allowed in the public assistance grant as well as what the recipients had said that they were paying for rent.

Q. Do you mean to say there was actual contact made with the client or was this taken from information in the Department's files? A. It was taken—the actual allowance was taken from the budget computation worksheet, and the actual allowance (118) that the recipient was paying was taken from the application form, recertification form in which the applicant states how much their rent is.

Q. I see, but there was no other independent verification of those two items made? A. No, it was done strictly from the documents that we had.

Q. Now, according to this affidavit, Mrs. Harmon, you have been a case worker yourself for the defendant, is that correct? A. I was a home economist with the local department.

Q. I see, I am sorry.

Now, how did you determine that the housing was adequate; you used the term here that these allowances were

"sufficient" to provide adequate housing. How was that determination made? A. Under the current shelter policy in New York State, local Social Services Districts establish the shelter allowances and in doing so, establish an allowance for their community that they deem to be adequate.

Q. I see, we are talking about a deemed situation now.

With regard to the survey that you just told us about, was there any actual determination based upon an examination of the housing to disclose whether or not it was (119) adequate? A. That was not a part of the study.

Q. I see. So then would it be fair to say that from the facts of that study, or from the results of that study, it was not possible to determine the character of the housing in terms of its adequacy? A. We didn't go into types of housing other than the actual allowances and the actual cost of the housing for only ADC cases, I would add.

Judge Hays: How is the housing chosen for the clients so far as the people that are on welfare? Does the welfare organization itself go out and look for housing, or do the individuals find their own housing and then submit claims for it?

The Witness: I would say that generally, and I am sure there may be one exception, recipients find housing on their own, or when they come to apply, they have housing.

If a recipient wishes help in locating other housing, local agency staff is available to help them, if they request the assistance.

But recipients locate their own housing and they may live wherever they choose to live, providing that the health and safety of the children is safeguarded.

Judge Hays: Is there some inspection of housing (120) to find whether it is adequately protecting the children?

The Witness: Well, I think generally there are health stadards that have to be met in terms of the housing.

Q. With respect to that, Mrs. Harmon, you say generally there are health standards that have to be met, but nobody from the Department goes out to examine the housing as a matter of fact to see that these standards are met? A. No one from the State Department does, but I am sure, and this I don't know—

Q. If you don't know, don't tell us. A. Local agencies are responsible for this, and what the local agency does, I can not speak to.

Q. Now, Mrs. Harmon, you are familiar with the sections in question, the regulations 352.30(d) which provide for the proration of rent when a non-relative resides? A. Yes.

Q. What do you understand the purpose of that section to be? A. The purpose of that section is to provide that when recipients have someone living with them, a lodger, a paying lodger, or a paying boarder-lodger, that they are provided with an income exemption, in the case of the lodger up to $15 is disregarded, and it is used to meet additional (121) expenses that the individual may incur in having that other person in the home.

Q. But in a situation, as we have in the cases before us, in which the lodger, so-called, actually makes this contribution, then under the operation of that regulation, a pro rata share is attributed to the lodger and deducted from the normal shelter grant.

What is the purpose of that? What are you to trying to accomplish? A. We are, in providing the public assistance grant, meeting the needs of the public assistance family, and in doing so, if there is another person in the household, we would provide the share of the household expenses, another non-paying member of the household, we

would provide that share of the expenses that were attributable to the public assistance family.

Q. Well, let me ask you this, Mrs. Harmon. You have indicated that what the Department tries to do is meet the need of the recipient household. Now, in the case of Annie Taylor, one of the plaintiffs in this case, are you familiar with the facts in this case, insofar as they pertain to Annie Taylor? A. I have read some. I have some—

Q. I call your attention to the fact that Annie (122) Taylor resides with her daughter and another adult sister, and that as a matter of fact, there was a lease executed between Annie Taylor and the landlord requiring her to pay a fixed amount of rent.

Now, in determining the needs of that family, are you saying that you do not go by the amount of money she must actually pay in determining the shelter allowance? A. Because there were three people in the assistance group in that case.

Q. Yes. A. And prior to a particular point in time, the sister, as well as Mrs. Taylor and the child, they were all in receipt of assistance. And when they were all in receipt of assistance, Mrs. Taylor and her daughter's share were two-thirds of the total amount of shelter, and the sister had a one-third share, because she was using one-third of the unit.

Q. But my question is this, Mrs. Harmon. In determining the need of the recipient, Annie Taylor, isn't her need what she must actually pay in order to stay in those premises or are you saying it is something else? A. It is for the unit, the housing unit. Her needs must be considered in the total, in her total living situation.

In this particular instance, her living situation (123) was such that she chose to live with another individual, in this case, her sister, and her share of the total living unit's expenses was—and what the public assistance grant was for—was for herself and her child. Therefore, the two-thirds of

the total shelter. Because the other person in the household was actually utilizing some of the space and the furniture and like that.

Q. Then you are saying to me, if I understand you correctly, Mrs. Harmon, that in spite of the fact that Mrs. Taylor, the plaintiff Taylor, was obligated by lease to pay a certain fixed amount for rent, that that is not how you determine what her shelter need was? A. No.

Q. Now, as a matter of fact, in the operation of this particular regulation that we are talking about, if you know, Mrs. Harmon, is any consideration or any individual fact-finding done in these particular cases or any others, to disclose what in fact is going on in the household, whether or not contributions are in fact being made, whether or not space is adequate, etc.? A. Well, in renting the apartment, the recipient, applicant-recipient, would be evaluating that for herself or himself when they made arrangements for that particular housing.

(124) What was the rest of the question?

Q. Well, the question was, is there an individual determination made in each case to determine whether in fact first of all contributions are being made, and, secondly, whether or not the space, that there is any excess space, as has been suggested earlier. A. As regards any excess space, if you mean someone from the Department determining that there is excess space?

Q. That's correct, before the operation of this regulation takes place. A. I don't believe any individual, case-by-case determination is made.

Judge Hays: Do you have maximum rental for families of various sizes?

The Witness: Yes.

Judge Hays: And the recipient can just rent any apartment that he wants so long as it is within that maximum?

The Witness: Yes, that's true.

Judge Hays: How many rooms there may be, he can have that apartment that he can get, as the maximum room he can get?

The Witness: Yes.

Q. Mrs. Harmon, I ask you this. Are you familiar with (125) the facts in the case of the plaintiff Ortey also? A. Yes, somewhat.

Q. If you recall in that case, the recipient and her son were living in quarters, two-bedroom quarters, and an allowance had been established for them of $145.00 a month. Subsequently, a third son—second son, rather—came home, adult son, non-recipient, moved in, and they sought to reduce the shelter allowance, pro rata.

Now I ask you this.

At the time that the Department okays the rental allowance, at the time when there is no non-recipient in the household, had the Department at that point made a determination that the space that they are paying for is adequate for that recipient family's need? A. If the recipient feels that it is adequate for their needs and the safety and well-being of the child is protected, then it would be assumed that it was adequate for their needs.

Q. Then at that point the Department would not have made a determination that there was any excess space that they were paying for? A. No.

Q. Then are you saying then that the mere fact that another person comes into that family unit to live changes (126) the finding as to whether or not there is excess space available or not, that mere fact alone? A. No. Many times, a family or a non-public assistance family, you have a set amount of space that you and your family are living in. If someone else comes to live with you, this is not to say that before you had too much space.

Q. That's my question. That result does not follow? A. Not necessarily that there was too much space before, or—

Judge Bauman: Put another way, if I may, this penalty of reducing the allowance has nothing to do with whether there is too much space or too little space, is that not the fact? It has nothing to do with space; it has to do with the fact that a non-recipient has moved in, isn't that what it's all about?

Judge Weinstein: You don't have to accept the characterization of a "penalty".

The Witness: It is not a penalty. I don't feel it is a penalty.

Judge Bauman: I withdraw the characterization.

But it has nothing to do with too much or too little space; is that correct?

The Witness: Yes.

(127) Judge Bauman: Thank you.

Q. That was the point I had in mind, Mrs. Harmon.

Mrs. Harmon, I ask you this question, that is, under the regulations, insofar as it perstains to recipients of welfare, public assistance, the recipient is given his cash grant in just about all cases, is that not correct? A. Yes.

Q. And the recipient is free to do with this cash grant as she pleases, is that not correct? A. Providing the health and welfare of the child or children is safeguarded.

Q. Right. So that when a grant, including shelter allowance and basic needs is given to the recipient, there are no strings attached to it, she can dispose of it in any way she wants with that one proviso that she not jeopardize the health or welfare of her children? A. He or she can spend it to meet the needs of their family.

Q. Would that include, for example, having a guest in for a meal? A. Having a guest in for a meal?

Q. Yes. A. If that's what they chose to do.

Q. Would that include a guest staying overnight? (128) A. I would assume so, because's that's not something we would monitor.

Q. At what point would you become interested—withdrawn.

Is there any period of time that a guest must stay in the home before the operation of the regulation that we have in mind comes into play? A. I don't think there is a specific time limit set forth. There isn't a specific time limit set forth in the regulation.

Q. But you do make a distinction between a guest who is there for a weekend and a guest who is there for a month? A. I think general practice is that a guest doesn't stay for a month. At least it hasn't—I wouldn't consider anyone that stayed with me a month a guest.

Q. Are you aware of any policy about this particular matter? A. Policy as defined—

Q. State policy, yes. A. What constitutes the difference between a guest and a lodger?

Q. Right. A. No, I don't believe there is any stated state policy.

Q. Mrs. Harmon, there is nothing in the regulations (129) that prohibits a recipient from making a gift of a part of their grant if they so desire, provided they do not violate the exception you indicated, namely, that they do not place their children in any kind of danger?

Mrs. Gordon: Objection, your Honor. Is the question, is there nothing in the regulations, or the state law, as meeting 18—

Q. Specifically, talking about 18 NYCRR? A. To the best of my knowledge, and I am sure I don't have as great a knowledge of the regulations as you do, a recipient, for example, can give a gift to a friend, or to a member of their family. There would be nothing to prohibit that.

Judge Hays: Does the recipient decide that he could assign his right to receive the payment from the state to somebody that he felt needed it more than he did?

The Witness: No, a recipient can't do that, because the eligibility is determined on the basis of his circumstances and his resources and any income. I don't see how a recipient could assign their monthly public assistance check to someone else.

Mr. Clark: I have no further questions.

Thank you.

Judge Hays: Mrs. Gordon.

(130) Redirect Examination by Mrs. Gordon:

Q. Mr. Clark was asking you previously some methods on how you—not how you, but how the local district, if you knew, checked out the circumstances of a given AFDC public assistance unit with respect to whether the child was being deprived or what have you.

I would like to ask you, are you familiar with the concept of the home visit? A. Yes.

Q. Is that one of the devices to your knowledge that the local agency uses in order to see if the child is being properly cared for or if the habitation is suitable? A. I believe they do use that.

Q. Judge Hays asked me before, during the course of the plaintiff's case, that with respect to the—what was the effect, or who constituted, or what was the effect of the—I beg your pardon.

The people in the case load, that 7% who did not receive shelter allowances equal to their rent, that 7% who would in effect receive less shelter allowance than they were paying in rent.

Do you have any information as to who is in that 7% and why they are there? (131) A. Well, part of the 7%

includes persons who are employed, for example, the ADC mother who would be employed and be eligible for the 30 and a third work exemptions so that they would have extra money, and many of the recipients have elected to supplement their rent allowance from the agency with that money, and in some instances, the extra money for rent is only—is a matter of $5.00, and the recipient has chosen to take this money out of their grant and supplement the rent allowance to that amount of money.

Judge Hays: Would the people who are subject to the lodger restriction also be subject to the 7%?

The Witness: No, I don't believe so.

Judge Hays: They are not?

The Witness: No.

Q. One last question.

To your knowledge when the local district makes a grant of public assistance to a public assistance unit, is it limited in making that grant to providing benefits or sustenance, regardless of how you characterize it, for that public assistance unit alone, or is it permitted to give benefits to that public assistance unit to be used for the benefit of another who has not come to the local agency and been determined to be eligible? A. The grant is given for the applicant, and the (132) persons that he or she state in the application, and in the case of the mother and her children, she would come in and make application for herself and her children, and the public assistance grant would be determined on the basis of her immediate family's needs and not neighbors and friends.

Q. Do you know whether or not state law provides for penalties, criminal penalties, against a welfare recipient who uses her grant for the benefit of another not determined to be eligible or who diverts that grant for the benefit of another not determined to be eligible?

I am only asking whether or not you know if there are penalties in the law. A. I don't particularly—I am not sure. I don't know the law in that regard.

Mrs. Gordon: Thank you very much.

Mr. Clark: Just one further question.

Recross Examination by Mr. Clark:

Q. With respect to the last series of questions by Mrs. Gordon, correct me if I am wrong, if I understood your testimony earlier, when a grant is given to a client of public assistance, there's no strings attached to that grant, that client can use that grant as long as she sees fit?

Judge Hays: She has testified she couldn't assign (133) the right to receive the grant to somebody else so at least that string is attached, according to her testimony.

Judge Bauman: She can't use it, obviously, as the witness has testified, in such a way as to result in harm or to harmfully affect the minor children, I gather, in the household, so there are some limitations.

I understood you to say that that is a limitation, that the money must be used in the first instance so as not to jeopardize the well-being of infant children among others; is that right?

The Witness: Yes.

For example, there is money in the public assistance grant for food and for clothing and for other items of need. The Department does not tell the recipient how much money they would have to spend for food, how much for clothing, and that they have to have a telephone, for example. This is something that they can choose to have or not have, and the

amount of money they spend of food, they govern. It is not something that is set forth that you have to spend X number of dollars.

Q. So the client has some area of discretion? A. There is some discretion, yes.

Q. Now, in your reading the facts with respect to the plaintiffs in this case, is there any evidence in any of (134) these cases that these plaintiffs are violating either of the two exceptions that you have stated? A. There are other exceptions, I am sure.

Q. Or any other that you may know? A. Well, in meeting shelter needs, we are meeting the shelter needs of that family, their share of the total shelter needs, and by providing two-thirds of the shelter needs we are meeting the needs of that shelter family when there is another non-recipient in the household.

Q. No, that's not my question.

My question is this. You have indicated there are situations or certain exceptions which prohibit certain use of public assistance funds by the recipient. Now, the use that the funds were put to in this case, as you know from the facts in this case, were any prohibitions violated?

Mrs. Gordon: Objection, your Honor. This witness has testified that she is not familiar with the law of the State. The law of the state is codified and if indeed these recipients committed any crime or violated any other administrative regulation, other than the ones in issue herein, such would appear by comparison of their facts to the law as it is promulgated and not by this witness' statement as to the laws applied to the facts.

Mr. Clark: Your Honors, I would simply point out (135) in the witness' affidavit she makes a statement that she is fully conversant with the policies

and regulations which affect the receipt of welfare in the State of New York, and I therefore think she could answer this question.

Judge Hays: Well, let's see what she thinks.

Could you answer the question?

Judge Weinstein: If you don't know, just say you don't know.

The Witness: I am not sure of his question.

Mr. Clark: Nothing further.

Judge Weinstein: I have a question.

By Judge Weinstein:

Q. In Paragraph 5, you say, "The exemption of $15 monthly," and then later in the paragraph you say, "The $15 minimum payment for lodging."

Can you explain the two usages of the $15? A. It is the same $15.

Q. Is it an exemption or minimum payment? A. For the lodger that pays $15 or more, the first $15 is exempt, and the $15 is the point that determines whether or not shelter is prorated, so in fact the first $15 is an income exemption, it is also the minimum that has been established.

Q. So, in the case of the young lady who testified (136) this morning, Mrs. D'Alessio, who is getting $179 a month for shelter, she could have taken only $15 a month from the lodger and complied? A. Yes.

Q. And then she would have been given an exemption of $15? A. Yes.

Q. And so she would have gotten the same $179? A. Yes.

Q. So all she had to do, if she knew enough about the regulations and all these exemptions, was tell her social worker, "I am getting $15 a month from him," take the $15, give it to him back, and the whole thing would have been avoided, is that right? A. Yes.

Judge Weinstein: All right. Thank you.

Mrs. Gordon: Your Honor, I just would like to call to your Honor's attention, you might want to pursue that a little further, because you had asked me previously what happens when the lodger pays, and it might be relevant to ask what happens if he pays more than the $15.

Judge Weinstein: You are free to ask any question you want. It is your witness.

Mrs. Gordon: Thank you.

(137) Redirect Examination by Mrs. Gordon:

Q. Just so the record may be clear, Mrs. Harmon, what happens if the non-boarding lodger pays more than $15? A. The excess of $15 is applied against the needs of the public assistance family's income.

Mrs. Gordon: That is all. Thank you very much.

(The witness was excused.)

Mrs. Gordon: At this time, your Honor, we call Carol Yvonne Raspberry, and that is the witness upon which I volunteer to make an offer of proof.

Your Honors, as the several Courts who have considered this matter have noted, and as defendants have contended all along, one of the purposes and one of the effects of 352.30(d) is to avoid having a non-recipient in the household who is getting a free ride on the welfare system to the extent of free rent.

Now, as I noted previously to the Court this morning, these lodgers tend to fall into two categories, those who are claimed to be needy, but who have failed to apply for public assistance, and those who in fact have the capacity to contribute but refuse to do so.

Now, in Mrs. Hurley's case, she is a recipient, defendants contend, who had with her a lodger who had the (138) capacity to contribute.

Mr. Schwartz: We object, your Honor. That is a conclusion that counsel reached. There is no evidence in the record as to that. As a matter of fact, the evidence is quite to the contrary.

Mrs. Gordon: The record estabilshes that the individual—the uncontested facts in the record establish that the individual with whom Mrs. Hurley was living as her lodger was at all times employed, that he was employed prior to the time that the proration was to become effective, and that he was employed during the time the proration was effective.

Now, if in fact he had the capacity to contribute, and if in fact he made contributions to Mrs. Hurley, and then—and with the same level of capacity—and then resided in her household but refused to make such contributions in terms of the rental allowance, then that individual was getting a free ride on the welfare system, and the situation of Mrs. Hurely is a perfect example of one of the situations or one of the abuses that this regulation is designed to prevent.

Now, the purpose of calling Mrs. Raspberry is that she is a case worker who made a home visit to Mrs. Hurley's apartment, several home visits to Mrs. Hurley's apartment, and she is being called to testify to the contributions which (139) she observed in terms of furniture, furnishings, that this lodger in fact made to Mrs. Hurley a very short time prior to the point in time when the allowance was prorated, and as I indicated, the record establishes that this individual continued to be employed during the time that the allowance was prorated, and I would also call to the Court's attention that plaintiffs' counsel, when he had Mrs. D'Alessio on the stand, asked in his own direct examination the extent of the contributions that Mr. Mattola had made to her, and I respectfully request that the Court allow us to call Mrs. Raspberry so that she may testify to the kinds of contributions or the kinds of fur-

nishings that she observed in the home of Mrs. Hurley and the events surrounding the circumstances of that hom visit.

Mr. Kahn: Your Honors, I would object to any testimony that Mrs. Raspberry would give with respect to Mrs. Hurley on several grounds.

First, the affidavit that was submitted by defendants in response to the motion for summary judgment failed to state issues of fact. There are no issues of fact to be tried. Specifically, in fact, the defendants admitted an allegation which is made in Plaintiffs' 9-G statement to the effect that no financial support or contribution was made to plaintiff or her children, or on her behalf by her (140) male friend, and further, that he was not under any legal obligation to provide any support to her or her three children. That is specifically admitted in the 9-G statement. And Rule 9-G states that the papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there existed genuine issues to be tried. There is nothing in defendants' 9-G statement to indicate there is any material issue of fact to be resolved here.

Furthermore, in the decision which was rendered by the Commissioner a finding is also made of no contribution and no support. There was no inquiry at that time into whether or not gifts had previously been furnished to Mrs. Hurley for the simple reason that that would be wholly irrelevant to the question of whether or not Mrs. Hurley's grant should be reduced, and for the same reason it is irrelevant at this time.

First of all, all the gifts that were made were in fact made before the date of the reduction, which is challenged here, and, secondly, there is nothing in the regulations or in any statute which pertains to the administration of the Social Services program which indicates that a friend or a

relative of a recipient, whether or not he or she lives in the apartment, may or may not—rather, may (141) not give a gift of furniture or of anything else to the recipient.

And for those reasons, your Honor, we would object to any testimony given by Mrs. Raspberry.

Mrs. Gordon: Your Honors, I would just like to comment for a moment. There is no inconsistency with either plaintiffs' 9-G statement and this proof.

The 9-G statement and the no contribution specified therein goes to the period, four-month period, when Mrs. Hurley's shelter allowance was prorated. We do not contend that this ADR, the paramour, contributed to her during that four-month period. What we contend is that during that four-month period, Mr. ADR was getting a free ride on the welfare system because he at all times had the capacity to pay his own share of the rent as evidenced by the fact of the substantial contributions made to her just prior to these events, and that given his capacity to contribute and the operation of the regulation against him, that is an illustration of the proper effect of the regulation, and indeed—I am sorry, I am talking so much I am getting a little lost in my own morass here.

In addition, plaintiffs themselves, not on their motions for summary judgment, but at this trial here, have adduced evidence on what is supposed to be the nature (142) of the living arrangements among welfare recipients.

We believe it very pertinent to this case to show what the nature of the living arrangement was between Mrs. Hurley and this ADR, particularly insofar as it provides a perfect illustration of the appropriate operation of the regulation.

In addition, I think the testimony will be very brief, your Honor.

Judge Hays: We will not take the evidence.

Mrs. Gordon: Very well.

Judge Hays: Do you have any other witnesses?

Mrs. Gordon: The only additional witness is Marvin Rachlin with respect to whom we have an agreement to take a deposition.

Judge Hays: Do we have the affidavit?

Mrs. Gordon: Yes, your Honor.

Judge Hays: Mr. Schwartz, do the plaintiffs have anything further?

Mr. Schwartz: We would like to reserve a few minutes for oral argument on the law.

Judge Hays: You will both have an opportunity for oral argument on the law.

Judge Weinstein: Perhaps we can cut short the need. Why do you have to take Mr. Rachlin's deposition? (143) He is an attorney.

Mr. Schwartz: We may well not have to take it, your Honor. As I said, I have never looked at that affidavit.

Judge Weinstein: Take a look at it quickly. He argues the law.

Mr. Schwartz: If that's all it is, then—

Judge Weinstein: What does it add to your case?

Mrs. Gordon: It adds a substantial amount, going to the living conditions among the poor in Nassau County.

Judge Weinstein: Well, think seriously about whether you want to take a deposition.

Is that the only thing open?

Mrs. Gordon: Yes. There are a couple of other additional things open. Having received the surveys, the studies from plaintiff just last night, and his having received ours, I guess this morning, we had both agreed that if we deemed any other studies relevant to the issue, we would simply submit them to the Court on a stipulated basis.

Judge Weinstein: You can do all that and we can take judicial notice. I don't understand why you need any further depositions at all.

Mrs. Gordon: The only deposition now that Mrs. Hurley's information has been excluded is Mr. Schwartz' (144) cross examination of Mr. Rachlin. If Mr. Schwartz doesn't want to cross examine Mr. Rachlin, certainly we don't need an additional deposition.

Judge Weinstein: I don't see any point. There is so much material in the public domain here. What's the point of it? I don't say this critically. Almost everything we heard this morning could have been submitted in briefs referring to the public records.

Mr. Schwartz: Most likely there will be no need for a deposition, but I would like an opportunity after—

Judge Weinstein: I want to close up the whole hearing now, close it up on the facts. Take a look at it quickly and let's not drag it along. Let's see if we can finish this case.

Mr. Schwartz: We find the deposition unnecessary, your Honor.

Judge Hays: We will hear argument now.

* * * * * *

General Social and Economic Characteristics—New York, 1970 Census, Plaintiffs' Exhibit "A".

(See opposite page ☞)

Table 48. General Characteristics by Race, for Urban and Rural Residence: 1970

(Data based on sample; see text. For maximum base for derived figures (percent, median, etc.) and meaning of symbols, see text)

The State	The State				Urban				Rural farm			
	Total	White	Negro	Persons of Puerto Rico birth or parentage	Total	White	Negro	Persons of Puerto Rico birth or parentage	Total	White	Negro	Persons of Puerto Rico birth or parentage
AGE												
Total, all ages	18 236 967	15 863 867	2 166 560	872 471	15 604 435	13 303 727	2 126 961	861 875	300 319	297 355	2 763	380
Under 5 years	1 485 731	1 226 076	231 538	111 253	1 256 477	1 001 359	228 356	102 860	21 891	21 566	273	39
5 to 9 years	1 692 178	1 412 136	253 359	115 995	1 386 621	1 121 958	249 481	105 737	31 329	31 055	203	34
10 to 14 years	1 520 564	1 408 173	237 180	105 625	1 423 167	1 176 752	232 520	105 562	24 195	23 841	295	38
15 to 19 years	1 574 511	1 361 285	197 379	86 566	1 333 833	1 126 327	192 852	85 726	29 913	29 487	232	28
20 to 24 years	1 355 392	1 170 730	168 165	82 769	1 194 258	1 013 404	164 730	82 069	24 188	23 899	144	30
25 to 29 years	1 213 857	1 037 339	166 811	75 943	1 069 158	868 299	166 080	75 241	19 244	19 077	119	16
30 to 34 years	1 043 563	871 721	154 896	64 934	889 936	721 310	153 361	64 407	15 110	14 899	144	16
35 to 39 years	1 079 568	873 379	160 770	58 507	876 560	724 618	138 410	58 046	14 427	14 277	119	16
40 to 44 years	1 175 175	981 750	134 611	46 468	972 428	828 805	132 560	46 311	13 782	13 623	119	15
45 to 49 years	1 132 416	1 004 638	118 976	36 961	983 289	856 894	117 077	36 698	14 248	14 083	132	24
50 to 54 years	1 054 040	933 353	97 619	26 277	920 156	816 747	95 905	26 017	13 671	13 513	135	4
55 to 59 years	922 403	895 595	78 764	20 632	857 260	773 210	77 454	20 477	12 977	12 827	51	5
60 to 64 years	811 960	753 657	64 579	15 011	755 563	685 783	67 473	15 115	11 397	11 294	103	-
65 to 69 years	711 056	657 833	52 223	9 954	654 022	555 479	49 228	9 648	10 034	9 968	66	5
70 to 74 years	564 457	513 092	50 123	5 763	481 565	446 969	31 566	5 747	8 892	8 818	74	-
75 years and over	722 536	682 811	35 555	7 345	625 064	586 507	34 803	7 274	9 472	9 398	74	-
Under 18 years	5 868 130	4 962 044	847 125	390 110	4 874 946	3 986 433	817 543	387 494	111 445	110 305	932	135
21 years and over	11 145 756	10 149 992	1 215 976	433 212	9 968 308	8 670 209	1 115 500	411 316	176 802	175 021	1 273	190
65 years and over	1 666 451	1 634 536	117 501	23 657	1 515 801	1 508 814	105 947	22 940	30 498	30 228	148	10
Median age	27.4	31.5	24.8	20.9	30.9	32.4	24.9	20.5	27.3	27.3	27.8	25.2
Male, all ages	8 712 367	7 619 550	979 768	416 923	7 397 242	6 331 809	928 394	412 597	151 051	151 519	1 158	176
Under 5 years	767 418	632 012	116 147	57 411	634 713	511 507	104 552	57 045	11 258	11 103	146	7
5 to 9 years	858 767	722 191	129 071	58 671	728 816	592 963	124 260	58 454	15 064	15 049	79	34
10 to 14 years	876 463	748 666	119 603	53 619	741 660	598 204	117 032	53 238	18 463	18 307	121	9
15 to 19 years	765 934	681 478	96 430	42 873	660 789	559 923	90 483	42 741	16 096	15 984	110	15
20 to 24 years	617 337	539 247	70 410	35 395	540 102	464 659	68 219	34 958	7 913	7 817	92	12
25 to 29 years	577 635	497 658	72 205	34 767	498 165	420 131	72 614	34 558	7 300	7 209	61	9
30 to 34 years	509 036	424 187	68 210	31 216	435 234	342 487	66 585	30 795	6 377	6 268	72	16
35 to 39 years	496 690	420 696	62 710	26 916	419 970	338 796	61 277	26 591	6 294	6 203	67	11
40 to 44 years	540 876	473 036	60 209	21 330	462 267	398 041	59 065	21 156	9 253	9 126	108	11
45 to 49 years	536 077	477 498	53 410	16 922	481 446	404 100	52 378	16 710	9 293	9 193	89	19
50 to 54 years	493 564	448 742	42 523	12 213	425 992	380 472	41 556	12 101	10 161	10 078	58	-
55 to 59 years	440 542	422 674	16 748	9 522	398 263	381 758	33 729	9 450	9 365	9 341	24	-
60 to 64 years	381	359	20	6	325 574	313 591	23	6	7 371	7 488	48	-
65 to 69 years	304 566	289 428	15 660	4 662	280 847	237 260	22 362	4 654	5 941	5 878	47	-
70 to 74 years	227 304	211 918	13 322	2 410	195 899	180 896	13 239	2 407	4 208	4 168	29	-
75 years and over	279 542	263 619	13 830	2 842	239 015	223 636	13 456	2 801	4 108	5 048	39	-
Under 18 years	2 991 375	2 534 422	426 424	198 135	2 478 829	2 032 444	418 521	196 553	57 079	56 552	422	58
21 years and over	5 308 227	4 725 901	523 965	197 044	4 561 397	3 994 294	511 924	194 669	89 421	88 492	696	107
65 years and over	809 814	754 965	48 202	9 114	695 551	642 292	47 057	9 016	15 243	15 094	105	-
Median age	29.0	29.9	22.8	19.5	29.4	30.5	22.8	19.4	26.4	26.5	24.0	22.8
Female, all ages	9 532 384	8 244 317	1 186 792	455 548	8 207 193	6 971 918	1 148 767	453 278	149 268	145 836	1 605	204
Under 5 years	728 333	604 064	115 388	55 842	611 764	489 852	111 794	55 585	13 633	13 463	127	32
5 to 9 years	823 416	669 945	125 258	57 124	679 723	529 010	123 201	56 778	16 265	16 006	174	18
10 to 14 years	844 079	719 505	117 497	51 946	700 567	578 468	115 496	51 749	5 732	5 693	174	27
15 to 19 years	788 597	679 807	100 949	43 713	673 044	566 404	99 369	43 485	13 183	13 043	122	6
20 to 24 years	738 065	630 983	97 775	45 337	654 156	548 796	95 511	45 181	16 912	16 792	120	26
25 to 29 years	635 222	539 681	96 506	41 196	550 993	446 168	95 475	40 953	7 197	7 082	94	24
30 to 34 years	542 527	447 524	86 699	35 760	463 730	371 223	85 776	35 609	7 867	7 849	58	24
35 to 39 years	531 874	446 683	78 060	31 591	456 590	372 824	77 139	31 445	7 838	7 815	85	26
40 to 44 years	587 299	506 694	74 402	25 278	510 161	430 764	73 555	25 155	8 498	8 415	31	17
45 to 49 years	597 399	527 160	65 566	20 039	521 843	452 794	64 701	19 928	9 095	8 998	84	6
50 to 54 years	563 436	504 561	55 096	14 064	494 164	436 295	54 372	13 983	9 849	9 780	57	5
55 to 59 years	520 901	472 925	44 748	11 110	459 017	411 959	44 098	11 042	9 510	9 411	77	4
60 to 64 years	484 759	425 232	37 121	8 555	410 389	371 569	36 627	8 518	7 932	7 886	37	5
65 to 69 years	392 530	361 207	29 363	5 847	348 425	317 669	28 966	5 841	7 641	7 600	35	-
70 to 74 years	321 153	301 174	18 601	3 373	295 616	266 032	18 327	3 345	5 345	5 305	38	5
75 years and over	442 994	419 192	21 735	4 703	386 049	362 871	21 347	4 673	4 178	4 158	12	5
Under 18 years	2 876 755	2 427 622	430 701	191 975	2 396 115	1 955 989	414 022	190 926	53 966	53 753	510	77
21 years and over	6 187 159	5 443 901	685 011	238 228	5 406 911	4 676 005	676 576	237 057	87 381	86 529	527	123
65 years and over	1 156 677	1 081 573	69 699	13 943	1 020 090	946 572	68 640	13 859	15 255	15 134	63	10
Median age	31.9	33.1	26.3	22.1	32.5	34.1	26.4	22.1	28.8	28.1	23.3	30.8
RELATIONSHIP TO HEAD OF HOUSEHOLD												
Total population	18 236 951	15 885 867	2 166 568	872 473	15 604 415	13 303 727	2 126 961	861 875	300 319	297 355	2 763	380
In households	17 706 612	15 494 419	2 104 619	866 007	15 227 343	12 982 126	2 077 489	856 881	299 193	296 293	2 763	332
Head of household	5 935 060	5 214 615	653 669	243 071	5 179 440	4 564 518	638 169	241 935	75 620	74 827	744	136
Family head	4 609 668	4 069 135	497 950	212 922	3 964 530	3 432 344	492 039	211 930	74 663	74 060	474	70
Male	4 016 334	3 638 034	340 683	153 045	3 414 567	3 043 273	335 735	152 116	74 597	73 940	474	71
Female	593 304	431 101	157 267	59 857	549 963	389 073	156 303	59 814	66	120	-	-
Primary individual	1 325 422	1 145 530	165 718	30 149	1 214 910	1 037 212	164 151	30 005	1 057	914	143	1
Male	492 518	412 718	71 345	16 133	448 104	369 594	70 348	16 032	414	324	90	-
Female	832 904	732 812	94 373	14 016	766 806	667 618	93 765	13 973	643	590	53	1
Wife of head	3 839 847	3 487 944	313 519	143 960	3 260 481	2 915 585	311 133	143 091	74 563	73 940	474	70
Other relative of head	7 709 190	6 575 530	1 053 633	463 096	6 527 048	5 613 312	1 039 638	460 943	16 900	16 813	87	62
Not related to head	296 715	216 280	71 863	10 755	260 374	181 731	78 529	10 672	2 170	2 066	104	2
In group quarters	456 139	391 448	59 881	11 809	377 072	323 541	49 452	9 384	1 126	1 062	64	-
Inmate of institution	217 582	176 645	39 836	8 419	173 549	141 795	31 051	6 677	1 126	1 062	64	-
Other	238 557	214 803	20 045	3 390	203 523	181 746	18 401	2 907	-	-	-	-
FAMILIES BY PRESENCE OF OWN CHILDREN UNDER 18 YEARS												
Total families	4 609 638	4 068 135	497 958	213 923	3 964 338	3 432 346	492 638	211 938	75 637	74 888	674	76
With own children under 18 years	2 474 016	2 130 307	317 647	159 093	2 096 070	1 757 630	312 854	158 356	49 142	48 830	296	63
With own children under 6 years	1 171 987	991 886	163 916	91 411	984 011	806 765	163 869	90 957	17 083	16 879	186	29
Husband-wife families	3 868 468	3 493 334	337 589	144 138	3 365 733	2 919 119	313 817	143 195	73 731	73 397	298	71
With own children under 18 years	2 110 358	1 891 376	196 475	106 776	1 762 437	1 567 732	193 495	106 274	47 863	47 617	232	65
With own children under 6 years	1 027 274	907 444	104 931	63 203	849 412	731 997	105 290	62 775	16 391	16 265	168	29
Families with female head	593 384	431 181	137 267	59 857	549 863	339 873	186 383	59 816	3 887	3 797	63	5
With own children under 18 years	315 066	200 749	111 339	48 647	293 016	179 438	110 540	48 648	1 511	1 471	40	5
With own children under 6 years	126 838	72 574	55 173	26 383	121 507	65 629	54 853	26 297	508	468	40	-

Table 48. General Characteristics by Race, for Urban and Rural Residence: 1970–Continued

(Data based on sample; see text. For maximum base for derived figures (percent, median, etc.) and meaning of symbols, see text)

The State	Rural farm			
	Total	White	Negro	Persons of Puerto Rico birth or parentage
AGE				
Total, all ages	300 319	297 355	2 763	380
Under 5 years	21 891	21 566	273	39
5 to 9 years	31 329	31 055	203	34
10 to 14 years	24 195	23 841	295	38
15 to 19 years	29 913	29 487	232	28
20 to 24 years	24 188	23 899	144	30
25 to 29 years	19 244	19 077	119	16
30 to 34 years	15 110	14 899	144	16
35 to 39 years	14 427	14 277	119	16
40 to 44 years	13 782	13 623	119	15
45 to 49 years	14 248	14 083	132	24
50 to 54 years	13 671	13 513	135	4
55 to 59 years	12 977	12 827	51	5
60 to 64 years	11 397	11 294	103	-
65 to 69 years	10 034	9 968	66	5
70 to 74 years	8 892	8 818	74	-
75 years and over	9 472	9 398	74	-
Under 18 years	111 445	110 305	932	135
21 years and over	176 802	175 021	1 273	190
65 years and over	30 498	30 228	148	10
Median age	30.1	30.2	24.4	25.2
Male, all ages	151 051	151 519	1 158	176
Under 5 years	11 258	11 103	146	7
5 to 9 years	15 064	15 049	79	34
10 to 14 years	18 463	18 307	121	9
15 to 19 years	16 096	15 984	110	15
20 to 24 years	7 913	7 817	92	12
25 to 29 years	7 300	7 209	61	9
30 to 34 years	6 377	6 268	72	16
35 to 39 years	6 294	6 203	67	11
40 to 44 years	9 253	9 126	108	11
45 to 49 years	9 293	9 193	89	19
50 to 54 years	10 161	10 078	58	-
55 to 59 years	9 365	9 341	24	-
60 to 64 years	7 371	7 488	48	-
65 to 69 years	5 941	5 878	47	-
70 to 74 years	4 208	4 168	29	-
75 years and over	4 108	5 048	39	-
Under 18 years	57 079	56 552	422	58
21 years and over	89 421	88 492	696	107
65 years and over	15 243	15 094	105	-
Median age	29.6	29.6	30.8	27.2
Female, all ages	149 268	145 836	1 605	204
Under 5 years	10 633	10 463	127	21
5 to 9 years	15 265	15 106	174	18
10 to 14 years	17 732	17 554	174	29
15 to 19 years	14 669	14 543	122	6
20 to 24 years	7 197	7 082	94	26
25 to 29 years	7 167	7 069	58	24
30 to 34 years	7 438	7 315	85	26
35 to 39 years	8 498	8 415	31	17
40 to 44 years	9 095	8 998	84	6
45 to 49 years	9 849	9 780	57	5
50 to 54 years	9 510	9 411	77	4
55 to 59 years	7 932	7 886	37	5
60 to 64 years	7 641	7 600	35	-
65 to 69 years	5 345	5 305	38	5
70 to 74 years	4 178	4 158	13	-
75 years and over	5 782	5 723	12	5
Under 18 years	54 366	53 753	510	77
21 years and over	87 381	86 529	527	123
65 years and over	15 255	15 134	63	10
Median age	30.7	30.7	30.3	27.8
RELATIONSHIP TO HEAD OF HOUSEHOLD				
Total population	299 319	297 355	2 763	380
In households	298 193	296 293	2 763	332
Head of household	74 827	74 060	474	70
Family head	74 827	74 060	474	70
Male	74 597	73 940	474	71
Female	230	120	-	-
Primary individual	1 057	914	143	1
Male	414	324	90	-
Female	643	590	53	1
Wife of head	74 563	73 940	474	70
Other relative of head	16 900	16 813	87	62
Not related to head	2 170	2 066	104	2
In group quarters	1 126	1 062	64	-
Inmate of institution	1 126	1 062	64	-
Other	-	-	-	-
FAMILIES BY PRESENCE OF OWN CHILDREN UNDER 18 YEARS				
Total families	75 637	74 888	674	76
With own children under 18 years	49 142	48 830	296	63
With own children under 6 years	17 083	16 879	186	29
Husband-wife families	73 731	73 397	298	71
With own children under 18 years	47 863	47 617	232	65
With own children under 6 years	16 391	16 265	168	29
Families with female head	3 887	3 797	63	5
With own children under 18 years	1 511	1 471	40	5
With own children under 6 years	508	468	40	-

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The question on household relationship was asked of all persons. The item on type of unit was filled in the census office for each household.

Household.—A household includes all the persons who occupy a group of rooms or a single room which constitutes a housing unit. A group of rooms or single room is regarded as a housing unit when it is occupied as separate living quarters; that is, when the occupants do not live and eat with any other persons in the structure, and when there is either (1) direct access from the outside of the building or through a common hall or (2) complete kitchen facilities for the exclusive use of the occupants of the household. The average population per household is obtained by dividing the population in households by the number of household heads.

Relationship to head of household.—Five categories of relationship to head of household are recognized in this report. More detailed categories of relationship appear in subsequent reports.

1. *Head of household.*—One person in each household is designated as the "head," that is, the person who is regarded as the head by the members of the household. However, if a married woman living with her husband was reported as the head, her husband was considered the head for the purpose of simplifying the tabulations.

Two types of household head are distinguished—the head of a family and a primary individual. A family head is a household head living with one or more persons related to him by blood, marriage, or adoption. A primary individual is a household head living alone or with nonrelatives only.

2. *Wife of head.*—A woman married to and living with a household head, including women in common-law marriages as well as women in formal marriages. The number of women in this category may not always be the same as the number of "husband-wife households" and the number of "husband-wife families," because of minor differences in the weighting of the data.

3. *Child of head.*—A son, daughter, stepchild, or adopted child of the head of the household of which he is a member, regardless of the child's age or marital status. The category excludes sons-in-law and daughters-in-law. (See definition of "own child" below.)

4. *Other relative of head.*—All persons related to the head of the household by blood, marriage, or adoption but not included in either the category of "wife of head" or "child of head."

5. *Nonrelative of head.*—All persons in the household not related to the head by blood, marriage, or adoption. Roomers, boarders, lodgers, partners, resident employees, wards, and foster children are included in this category.

Group quarters.—All living arrangements other than households are classified by the Bureau of the Census as group quarters. Persons living in group quarters are shown in this report as either "inmate of institution" or "other group quarters" defined as follows:

Inmate.—Persons under care or custody at the time of enumeration in homes, schools, hospitals or wards for juveniles, the physically handicapped, or the mentally handicapped; homes or hospitals for mental, tuberculosis, or other chronic disease patients; homes for unwed mothers; nursing, convalescent, and rest homes; homes for the aged and dependent; and correctional institutions are enumerated as "patient or inmate" of an institution—regardless of their length of stay in that place and regardless of the number of people in the particular place. These persons are all shown in the tabulations as "inmate of institution."

Other group quarters.—A separate living quarters is called a group quarters if there are five or more persons unrelated to the head or, if there is no designated head, six or more unrelated persons in the unit. Places that fall into this category are rooming and boarding houses, communes, workers' dormitories, and convents or monasteries.

Persons residing in certain other types of living arrangements are classified as living in group quarters, regardless of the number or relationship of people in the unit. These include persons residing in military barracks, on ships, in college dormitories, or in sorority and fraternity houses; patients in short-term medical and surgical wards of hospitals who have no usual residence elsewhere; staff members in institutional quarters; and persons enumerated in missions, flophouses, Salvation Army shelters, railroad stations, etc. These people are shown in the tabulations as "in other group quarters."

Detailed Housing Characteristics—New York, 1970 Census, Plaintiffs' Exhibit "B".

(See opposite ☞)

Table 32. Occupancy and Plumbing Characteristics for the State: 1970

(Data based on sample; see text. For explanation of symbols, see text)

The State — Urban and Rural, Rural Nonfarm, and Occupied Rural Farm	The State					The State — Percent distribution				
			Rural					Rural		
	Total	Urban	Total	Nonfarm	Occupied farm	Total	Urban	Total	Nonfarm	Occupied farm
Total population	18 236 911	15 604 615	2 632 326	2 325 317	308 319					
All housing units	6 379 373	5 364 292	952 931	869 134	84 807	100.0	100.0	100.0	100.0	100.0
Vacant-seasonal, migratory, etc.	220 059	140 868	118 521	118 521		3.3	2.6	14.2	15.8	
All year-round housing units	6 159 314	5 223 904	835 410	750 603	84 807	100.0	100.0	100.0	100.0	100.0
POPULATION										
Population in housing units, 1970	17 746 637	15 193 839	2 552 793	2 253 672	299 120					
Per occupied unit	3.0	2.9	3.4	3.4	3.5					
Owner	3.4	3.4	3.4	3.4	3.5					
Renter	2.8	2.6	3.2	3.1	3.6					
Population in housing units, 1960	16 397 019	14 933 535	2 374 534	2 047 978	326 556					
Per occupied unit	3.1	3.1	3.5	3.5	3.8					
TENURE, RACE, AND VACANCY STATUS										
All occupied units	5 913 749	5 160 824	752 925	668 329	84 807	96.0	96.9	90.2	89.0	100.0
Owner occupied	2 795 669	2 187 642	608 027	532 943	75 084	45.4	41.1	72.8	71.0	88.5
Percent of all occupied	47.3	42.4	80.7	79.7	88.5					
Cooperative or condominium	115 207	115 212	175	143	32	1.9	2.2			
White	2 655 049	2 053 058	601 998	527 453	74 545	43.1	38.6	72.1	70.3	87.9
Negro	129 039	125 016	3 983	3 607	376	2.1	2.3	0.5	0.5	0.4
Renter occupied	3 118 080	2 972 982	145 098	135 375	9 723	50.6	55.9	17.4	18.0	11.5
White	2 568 454	2 407 575	140 879	131 361	9 518	41.4	45.2	16.9	17.5	11.2
Negro	524 817	521 565	3 252	3 077	175	8.5	9.8	0.4	0.4	0.2
Vacant-year-round units	245 565	163 390	82 395	82 395		4.0	3.1	9.8	11.0	
For sale only	20 565	14 129	6 436	6 436		0.4	0.3	1.0	1.1	
Homeowner vacancy rate	0.8	0.6	1.6	1.6						
For all plumbing facilities	20 735	13 712	7 023	7 023		0.3	0.3	0.8	0.9	
For rent	95 082	83 830	11 252	11 252		1.5	1.6	1.3	1.5	
Rental vacancy rate	2.0	2.7	7.2	7.2						
With all plumbing facilities	86 979	73 277	9 702	9 702		1.4	1.5	1.2	1.3	
Rented or sold, awaiting occupancy	24 667	15 808	6 054	6 054		0.4	0.3	0.7	0.8	
Held for occasional use	61 616	20 511	41 107	41 107		1.0	0.4	4.9	5.5	
Other vacant	44 438	29 002	15 436	15 436		0.7	0.5	1.8	2.1	
All year-round housing units	6 159 314	5 223 904	835 410	750 603	84 807	100.0	100.0	100.0	100.0	100.0
PLUMBING FACILITIES										
With all plumbing facilities	5 981 853	5 203 398	782 455	702 282	80 173	97.2	97.1	93.7	93.6	94.5
Lacking some or all plumbing facilities	177 461	120 506	52 955	48 321	4 634	2.8	2.3	6.3	6.4	5.5
Lacking only hot water	27 459	17 418	10 041	9 037	1 004	0.4	0.3	1.2	1.2	1.2
Lacking other plumbing facilities	148 002	103 088	42 914	39 284	3 630	2.4	1.9	5.1	5.2	4.3
PIPED WATER IN STRUCTURE										
Hot and cold	6 094 091	5 299 277	794 714	713 261	81 453	98.9	99.5	95.1	95.0	96.0
Cold only	47 796	23 298	24 498	22 342	2 156	0.8	0.4	2.9	3.0	2.5
None	17 427	1 229	16 198	15 000	1 198	0.3	-	1.9	2.0	1.4
FLUSH TOILET										
For exclusive use of household	6 053 620	5 249 065	804 555	722 468	82 087	98.3	98.6	96.3	96.3	96.8
For use by another household	70 524	67 687	2 837	2 548	289	1.1	1.3	0.3	0.3	0.3
None	35 170	7 152	28 018	25 587	2 431	0.6	0.1	3.4	3.4	2.9
BATHTUB OR SHOWER										
For exclusive use of household	6 072 961	5 229 306	796 655	713 232	81 423	97.8	98.2	93.1	95.0	96.0
For use by another household	70 915	67 954	2 961	2 671	290	1.2	1.3	0.4	0.4	0.3
None	85 438	27 644	57 794	54 700	3 094	1.1	0.5	4.5	4.6	3.6
COMPLETE KITCHEN FACILITIES										
All year-round units	6 159 314	5 223 904	835 410	750 603	84 807	100.0	100.0	100.0	100.0	100.0
For exclusive use of household	6 040 018	5 233 027	806 991	724 017	82 964	98.1	99.3	96.6	96.5	97.8
For use by another household	21 845	21 268	577	523	54	0.4	0.4	0.1	0.1	-
No complete kitchen facilities	97 451	69 579	27 872	26 063	1 809	1.6	1.3	3.3	3.5	2.1
Renter occupied	3 118 080	2 972 982	145 098	135 375	9 723	100.0	100.0	100.0	100.0	100.0
For exclusive use of household	3 041 102	2 901 734	139 418	130 143	9 275	97.5	97.6	96.1	96.1	95.4
For use by another household	17 615	17 387	304	286	18	0.6	0.6	0.2	0.2	0.2
No complete kitchen facilities	59 363	53 860	5 376	4 946	430	1.9	1.8	3.7	3.7	4.4
ACCESS										
With public transit	6 150 365	5 215 195	834 872	750 108	84 764	99.8	99.8	99.9	99.9	99.9
Limited to public transit	9 249	8 711	538	495	43	0.2	0.2	0.1	0.1	0.1
TELEPHONE										
[illegible]	5 913 [illegible]	5 [illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

The State — Urban and Rural, Rural Nonfarm, and Occupied Rural Farm	The State									
			Rural					Rural		
	Total	Urban	Total	Nonfarm	Occupied farm	Total	Urban	Total	Nonfarm	Occupied farm
ROOMS										
All year-round units	6 159 314	5 323 904	835 410	750 603	84 807	100.0	100.0	100.0	100.0	100.0
1 room	68 [illegible]	58 [illegible]	[illegible] 315	[illegible] 038	[illegible] 277	1.1	1.1	0.9	1.1	0.3
2 rooms	247 542	240 414	7 128	6 038	1 090	4.0	4.5	0.9	0.8	1.3
3 rooms	1 [illegible] 227	1 [illegible] 202	[illegible] 025	[illegible] 391	[illegible] 634	[illegible] 19.8	[illegible] 21.6	[illegible] 3.0	[illegible] 2.6	[illegible] 7.5
4 rooms	[illegible] 733	1 [illegible] 590	[illegible] 143	[illegible] 933	[illegible] 210	[illegible] 28.5	[illegible] 29.8	[illegible] 17.2	[illegible] 16.1	[illegible] 24.8
5 rooms	[illegible] 077	[illegible] 030	[illegible] 047	[illegible] 954	[illegible] 093	[illegible] 23.3	[illegible] 22.6	[illegible] 26.4	[illegible] 26.7	[illegible] 25.9
6 rooms	[illegible] 342	849 526	126 966	116 [illegible]	10 [illegible]	13.7	13.7	15.2	15.5	12.0
7 rooms	369 955	463 356	106 605	112 153	14 452	9.6	8.7	12.8	14.9	17.0
8 rooms	244 251	257 395	86 856	76 164	10 692	5.0	4.8	10.4	9.9	12.6
9 rooms or more	267 664	282 143	85 523	68 943	16 580	4.3	3.4	10.2	9.0	21.0
Median	4.8		5.9	5.7	6.7					
Owner occupied	2 795 669	2 187 642	608 027	532 943	75 084	100.0	100.0	100.0	100.0	100.0
1 room	4 520	3 340	1 180	986	194	0.2	0.2	0.2	0.2	0.3
2 rooms	12 [illegible]	9 [illegible]	3 [illegible]	2 955	344	0.5	0.5	0.5	0.5	0.5
3 rooms	68 552	54 384	14 168	12 [illegible]	1 [illegible]	2.2	2.4	2.3	2.4	1.6
4 rooms	295 010	223 012	71 998	65 861	6 137	10.6	10.2	11.8	12.4	8.2
5 rooms	651 429	436 161	120 268	115 345	10 923	19.9	19.7	20.8	21.6	14.5
6 rooms	797 [illegible]	544 568	140 304	126 485	14 019	29.2	29.6	23.1	23.7	18.7
7 rooms	506 641	398 [illegible]	108 096	92 [illegible]	13 195	18.1	18.2	17.8	17.4	17.6
8 rooms	367 [illegible]	284 [illegible]	82 [illegible]	71 [illegible]	11 [illegible]	11.0	10.7	13.5	13.6	13.6
9 rooms or more	256 444	167 135	71 329	54 001	17 328	8.5	7.6	11.7	10.1	23.1
Median	6.1		6.1	6.0	6.8					
Renter occupied	3 118 080	2 972 982	145 098	135 375	9 723	100.0	100.0	100.0	100.0	100.0
1 room	152 [illegible]	149 [illegible]	2 908	2 845	63	4.9	5.0	2.0	2.1	0.6
2 rooms	243 747	238 [illegible]	4 962	4 731	231	8.5	8.7	3.4	3.5	2.4
3 rooms	926 061	867 [illegible]	59 018	58 282	736	29.7	30.5	13.1	13.5	7.6
4 rooms	914 555	878 [illegible]	34 [illegible]	34 [illegible]	1 [illegible]	29.3	29.5	24.0	25.3	16.5
5 rooms	496 [illegible]	465 [illegible]	30 [illegible]	29 [illegible]	1 [illegible]	15.9	15.7	21.2	21.4	18.2
6 rooms	248 [illegible]	225 [illegible]	23 [illegible]	21 [illegible]	1 [illegible]	8.0	7.6	16.0	15.2	17.4
7 rooms	70 [illegible]	57 [illegible]	13 [illegible]	11 [illegible]	1 [illegible]	2.3	1.9	9.1	8.1	11.9
8 rooms	28 [illegible]	18 [illegible]	7 [illegible]	6 [illegible]	[illegible]	0.9	0.6	5.1	4.4	9.4
9 rooms or more	14 [illegible]	11 [illegible]	7 [illegible]	5 [illegible]	1 [illegible]	0.6	0.4	4.9	4.3	13.1
Median	3.7		4.8	4.8	5.7					
Year-round vacant for sale	22 565	14 129	8 436	8 436		100.0	100.0	100.0	100.0	
1 to 3 rooms	2 067	1 389	678	678		8.9	9.4	8.1	8.1	
4 and 5 rooms	7 [illegible]	4 [illegible]	2 [illegible]	2 [illegible]		37.4	39.2	33.2	33.2	
6 and 7 rooms	4 [illegible]	5 [illegible]	3 [illegible]	3 [illegible]		25.5	26.4	29.5	29.5	
8 rooms or more	4 572	3 [illegible]	1 [illegible]	1 [illegible]		20.3	19.2	22.1	22.1	
Median	5.9		5.9	5.9						
Year-round vacant for rent	95 082	83 830	11 252	11 252		100.0	100.0	100.0	100.0	
1 room	7 957	7 427	530	535		8.4	8.9	4.8	4.8	
2 rooms	7 481	6 564	917	917		7.8	7.9	7.8	7.8	
3 rooms	24 409	22 [illegible]	2 305	2 305		25.7	26.4	20.5	20.5	
4 rooms	26 763	25 [illegible]	3 [illegible]	3 [illegible]		28.3	28.7	27.0	27.0	
5 rooms	18 140	15 [illegible]	2 [illegible]	2 [illegible]		17.0	16.6	19.5	19.5	
6 rooms or more	10 287	7 [illegible]	2 [illegible]	2 [illegible]		10.8	9.5	20.5	20.5	
Median	3.8		4.1	4.1						
PERSONS										
Owner occupied	2 795 669	2 187 642	608 027	532 943	75 084	100.0	100.0	100.0	100.0	100.0
1 person	293 [illegible]	223 [illegible]	69 [illegible]	62 [illegible]	7 [illegible]	10.5	10.2	11.5	11.6	10.4
2 persons	716 [illegible]	581 [illegible]	135 [illegible]	130 [illegible]	22 [illegible]	27.1	26.6	24.9	24.8	29.5
3 persons	493 [illegible]	346 [illegible]	86 [illegible]	86 [illegible]	12 [illegible]	17.7	15.8	16.3	16.2	16.7
4 persons	532 [illegible]	420 [illegible]	100 [illegible]	91 [illegible]	11 [illegible]	19.1	19.2	16.9	17.1	15.4
5 persons	262 [illegible]	204 [illegible]	74 [illegible]	65 [illegible]	8 [illegible]	13.0	13.2	12.2	12.3	11.7
6 persons	193 192	148 [illegible]	44 [illegible]	38 [illegible]	5 [illegible]	6.9	6.8	7.3	7.2	7.9
7 persons or more	101 935	77 455	24 [illegible]	20 [illegible]	3 [illegible]	3.6	3.5	4.0	3.9	4.7
Median	3.2	3.3	3.1	3.1	3.1					
Renter occupied	3 118 080	2 972 982	145 098	135 375	9 723	100.0	100.0	100.0	100.0	100.0
1 person	901 684	875 701	25 983	25 [illegible]	1 [illegible]	28.9	29.4	17.9	18.6	14.8
2 persons	937 329	900 562	36 767	34 [illegible]	2 [illegible]	30.1	30.3	25.3	25.7	22.7
3 persons	512 314	483 687	28 627	26 [illegible]	2 [illegible]	16.4	16.3	19.7	19.3	18.4
4 persons	378 999	357 237	21 762	20 [illegible]	1 [illegible]	12.2	12.0	15.0	15.0	15.6
5 persons	194 767	182 785	11 982	10 [illegible]	1 [illegible]	6.3	6.1	8.3	8.1	11.6
6 persons	98 180	90 188	7 992	7 [illegible]	[illegible]	3.1	3.0	5.5	5.3	7.4
7 persons or more	67 221	57 304	9 917	9 [illegible]	[illegible]	2.2	1.9	6.8	6.3	7.4
Median	1.9	1.9	2.7	2.7	2.7					
PERSONS PER ROOM										
Owner occupied	2 795 669	2 187 642	608 027	532 943	75 084	100.0	100.0	100.0	100.0	100.0
0.50 or less	1 [illegible] 503	1 [illegible] 330	335 [illegible]	309 [illegible]	25 [illegible]	53.0	52.4	55.1	54.3	33.3
0.51 to 0.75	711 [illegible]	574 [illegible]	137 [illegible]	121 [illegible]	15 [illegible]	25.5	26.3	22.6	22.8	21.0
0.76 to 1.00	472 [illegible]	374 [illegible]	103 [illegible]	93 [illegible]	10 [illegible]	17.1	17.6	17.0	17.5	13.5
1.01 to 1.50	108 [illegible]	86 [illegible]	22 [illegible]	24 [illegible]	2 [illegible]	3.9	3.7	3.6	4.5	3.8
1.51 or more	15 [illegible]	10 [illegible]	4 [illegible]	4 [illegible]	[illegible]	0.5	0.5	0.6	0.8	0.7
Renter occupied	3 118 080	2 972 982	145 098	135 375	9 723	100.0	100.0	100.0	100.0	100.0
0.50 or less	1 [illegible] 329	1 [illegible] 268	61 [illegible]	56 [illegible]	4 [illegible]	42.2	42.0	42.0	41.5	41.5
0.51 to 0.75	757 541	751 933	25 608	23 [illegible]	2 [illegible]	24.3	25.3	17.6	17.3	23.0
0.76 to 1.00	705 556	674 474	31 082	29 [illegible]	2 [illegible]	22.6	22.7	21.4	21.5	20.7
1.01 to 1.50	250 761	221 485	9 296	8 [illegible]	[illegible]	8.0	7.4	6.4	6.3	6.1
1.51 or more	79 663	76 909	2 [illegible]	2 [illegible]	[illegible]	2.5	2.6	1.9	1.9	3.0
With all plumbing facilities	3 [illegible] 126	3 [illegible] 994	718 [illegible]	638 [illegible]	80 [illegible]	100.0	100.0	100.0	100.0	100.0
Owner occupied	2 732 [illegible]	2 168 [illegible]	564 [illegible]	512 [illegible]	51 [illegible]	97.7	99.1	94.9	96.2	68.0
1.00 or less	2 622 [illegible]	2 [illegible] 297	556 [illegible]	506 [illegible]	49 [illegible]	93.8	98.3	94.0	95.1	65.3
1.01 to 1.50	105 [illegible]	79 [illegible]	25 [illegible]	23 [illegible]	2 [illegible]	3.8	3.7	4.4	4.3	2.7
1.51 or more	14 [illegible]	10 [illegible]	3 [illegible]	3 [illegible]	[illegible]	0.5	0.5	0.7	0.7	0.0
Renter occupied	3 [illegible] 733	3 [illegible] 708	154 [illegible]	125 [illegible]	9 [illegible]	100.0	100.0	100.0	100.0	100.0
1.00 or less	3 717 [illegible]	3 593 [illegible]	123 [illegible]	115 [illegible]	8 [illegible]	96.0	96.1	92.2	92.2	91.8
1.01 to 1.50	329 [illegible]	298 [illegible]	31 [illegible]	7 [illegible]	[illegible]	8.5	8.3	20.2	6.2	4.7
1.51 or more	73 [illegible]	71 [illegible]	2 [illegible]	1 [illegible]	[illegible]	1.9	2.0	1.4	0.8	3.5

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ble 34. Financial Characteristics for the State: 1970

(Data based on sample; see text. For minimum base for derived figures (percent, median, etc.) and meaning of symbols, see text)

e State ban and Rural	The State			The State—Percent distribution		
	Total	Urban	Rural	Total	Urban	Rural
...ge						
Specified owner-occupied	1 933 996	1 576 813	404 184	100.0	100.0	100.0
...ss than $5 000	26 569	9 986	16 583	1.3	0.6	4.1
...0 to $7 499	54 040	26 852	27 188	2.7	1.7	6.7
...0 to $ 9 999	83 599	48 812	34 787	4.2	3.1	8.6
...0 to $12 499	128 197	83 964	44 233	6.5	5.3	10.9
...0 to $14 999	113 569	96 325	37 224	5.7	6.1	9.2
...0 to $17 499	155 196	122 760	42 [illegible]	7.8	8.0	10.5
...0 to $ 9 999	113 083	154 608	38 475	5.7	9.8	9.5
...0 to $24 999	319 615	315 977	63 938	19.2	20.0	15.7
...0 to $34 999	457 211	397 252	59 859	23.1	25.2	14.7
...0 to $49 999	230 929	204 591	26 338	11.6	13.0	6.5
...0 or more	120 891	106 767	14 124	6.1	6.7	3.6
...ge	$22 600	$23 700	$17 500	...	...	...
Specified owner for sale	14 831	8 519	6 304	100.0	100.0	100.0
...ss than $5 000	1 004	185	819	6.8	2.2	13.0
...0 to $9 999	2 098	775	1 323	14.2	9.1	21.0
...0 to $14 999	2 254	1 087	1 167	15.2	12.8	18.5
...0 to $19 999	2 211	1 458	753	14.9	17.1	11.9
...0 to $24 999	2 151	1 406	745	14.5	16.5	11.8
...0 to $34 999	2 474	1 753	721	16.6	20.1	11.4
...0 to $49 999	1 735	1 187	548	11.7	13.9	8.7
...0 or more	904	706	226	6.3	8.3	3.6
...ge	$19 600	$22 700	$14 100	...	...	...
...ll plumbing facilities						
Specified owner-occupied	1 938 842	1 565 899	393 943	100.0	100.0	100.0
...ss than $5 000	19 608	8 634	10 974	1.0	0.6	2.8
...0 to $9 999	135 235	78 053	57 182	6.7	4.7	14.6
...0 to $14 999	258 868	178 862	80 006	13.2	11.4	20.4
...0 to $19 999	365 963	285 236	80 727	18.7	18.2	20.5
...0 to $24 999	377 728	314 159	63 569	19.3	20.1	16.2
...0 or more	805 440	704 955	100 485	41.1	45.0	25.6
...ge	$22 700	$23 800	$17 900	...	...	...
Specified vacant for sale	13 447	9 316	9 351	100.0	100.0	100.0
...ss than $5 000	451	117	334	3.3	1.4	4.2
...0 to $9 999	1 [illegible]93	719	1 074	13.1	8.6	20.1
...0 to $14 999	2 106	1 068	1 038	15.4	12.8	19.4
...0 to $19 999	2 159	1 442	717	15.8	17.3	13.4
...0 to $24 999	1 108	1 390	718	15.4	16.7	13.4
...0 or more	1 [illegible]50	3 580	1 470	37.0	43.0	27.5
...ge	$20 800	$22 900	$16 600	...	...	...
NTRACT RENT						
Specified owner-occupied	3 091 096	2 966 996	124 090	100.0	100.0	100.0
...ss than $20	23 122	19 523	3 610	0.7	0.7	2.9
...0 to $39	55 537	51 181	4 356	1.8	1.7	3.5
...0 to $59	322 506	305 156	17 350	10.4	10.3	14.0
...0 to $79	624 150	600 958	23 192	20.2	20.3	18.7
...0 to $99	582 334	565 719	16 615	18.8	19.1	13.4
...0 to $119	380 691	367 234	13 457	12.3	12.4	10.8
...0 to $149	392 927	380 129	12 798	12.7	12.8	10.3
...0 to $199	335 959	326 534	9 425	10.9	11.0	7.6
...0 to $249	128 993	124 544	2 363	4.1	4.2	1.9
...0 or more	125 524	120 443	1 081	3.9	4.1	0.9
...ge	85 418	85 575	19 843	28	22	16.0
	$96	$96	$84	...	...	...
Specified vacant for rent	93 644	83 631	10 013	100.0	100.0	100.0
...ss than $40	3 432	2 715	717	3.7	3.2	7.2
...0 to $59	12 554	10 935	1 619	13.4	13.1	16.2
...0 to $79	20 170	18 211	1 959	21.5	21.8	19.5
...0 to $ 99	17 662	16 017	1 645	18.8	19.2	16.4
...0 to $119	20 492	17 936	2 557	21.9	21.4	25.5
...0 to $149	10 761	9 758	953	11.5	11.7	9.5
...0 to $199	8 812	8 049	762	9.4	9.6	7.6
...ge	$90	$91	$89	...	...	...
...ll plumbing facilities						
Specified owner-occupied	3 993 353	3 837 913	155 438	100.0	100.0	100.0
...ss than $40	44 641	39 122	5 519	2.2	2.1	4.8
...0 to $59	293 317	282 161	11 [illegible]56	14.7	14.7	13.5
...0 to $79	570 904	578 721	22 183	28.6	27.1	19.2
...0 to $ 99	560 349	552 049	16 [illegible]00	14.0	14.4	10.3
...0 to $119	761 200	735 215	25 985	19.1	19.2	16.7
...0 to $149	619 933	607 177	12 [illegible]56	15.5	15.8	7.8
...0 to $199	80 [illegible]09	62 370	17 [illegible]99	2.0	1.6	11.5
...0 or more	$97	$97	$96	...	...	...
Specified vacant for rent	85 801	77 073	8 729	100.0	100.0	100.0
...ss than $40	2 258	1 824	434	2.7	2.4	5.0
...0 to $59	10 110	8 789	1 321	11.8	11.4	15.1
...0 to $79	18 066	16 390	1 676	21.0	21.3	19.2
...0 to $ 99	16 122	15 270	1 [illegible]52	19.2	19.8	14.3
...0 to $119	9 [illegible]65	7 229	2 [illegible]67	22.9	22.4	27.1
...0 to $149	19 [illegible]74	17 530	1 [illegible]44	22.5	22.9	18.9
...ge	$94	$94	$93	...	...	...
AT ON OF VACANCY						
[illegible]	33 [illegible]90	14 139	8 [illegible]51	100.0	100.0	100.0
[illegible]	8 [illegible]15	4 [illegible]58	1 [illegible]57	[illegible]5.0	30.5	17.6
[illegible]	9 [illegible]24	4 [illegible]76	2 [illegible]44	[illegible]5.1	33.8	29.3
[illegible]	[illegible]	4 [illegible]47	4 [illegible]55	[illegible]9.9	33.7	53.9
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

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...e Str... and Plumbing Characteristics for the State: 1970

(Data based on sample; see text. For meaning of symbols, see text)

The State Inside and Outside Standard Metropolitan Statistical Areas Urban and Rural, Rural Nonfarm, and Occupied Rural Farm	The State	Inside SMSA's	Outside SMSA's	Urban	Rural		
					Total	Nonfarm	Farm
All year-round housing units	6 139 316	5 344 983	814 333	5 333 936	805 410	730 683	84 807
UNITS IN STRUCTURE							
All year-round units	6 139 316	5 344 983	814 333	5 333 936	805 410	730 683	84 807
1, detached	3 344 293	2 784 972	559 [illegible]90	3 475 [illegible]74	669 [illegible]26	596 [illegible]56	72 [illegible]70
1, attached	179 438	174 [illegible]76	5 [illegible]52	186 [illegible]78	3 [illegible]48	2 [illegible]93	[illegible]55
2	901 [illegible]28	795 [illegible]64	106 [illegible]72	844 [illegible]54	57 [illegible]42	52 [illegible]97	5 [illegible]45
3 and 4	[illegible]44 581	393 [illegible]51	51 [illegible]30	403 [illegible]19	39 [illegible]66	36 [illegible]59	3 [illegible]09
5 or more	2 331 [illegible]16	1 [illegible]90 [illegible]70	51 [illegible]46	2 [illegible]32 [illegible]36	19 [illegible]73	19 [illegible]73	
Mobile home or trailer	77 [illegible]96	34 [illegible]57	43 [illegible]39	13 [illegible]65	44 [illegible]93	39 [illegible]29	5 [illegible]64
Owner-occupied	3 [illegible]95 [illegible]69	3 [illegible]69 [illegible]56	[illegible]26 [illegible]13	3 [illegible]87 [illegible]43	[illegible]06 [illegible]57	[illegible]33 [illegible]93	73 [illegible]64
1, detached	2 [illegible]13 [illegible]74	1 [illegible]92 [illegible]85	[illegible]40 [illegible]89	1 [illegible]59 [illegible]75	[illegible]67 [illegible]17	[illegible]57 [illegible]60	[illegible]66 [illegible]09
1, attached	[illegible]09 [illegible]26	[illegible]07 [illegible]75	2 [illegible]51	[illegible]67 [illegible]17	1 [illegible]19	1 [illegible]23	[illegible]96
2	[illegible]86 [illegible]63	[illegible]29 [illegible]31	37 [illegible]32	[illegible]45 [illegible]17	35 [illegible]36	33 [illegible]56	2 [illegible]80
3 and 4	39 [illegible]31	32 [illegible]93	7 [illegible]38	29 [illegible]78	3 [illegible]53	3 [illegible]53	[illegible]84
5 or more	139 [illegible]67	137 [illegible]88	2 [illegible]79	158 [illegible]92	1 [illegible]95	1 [illegible]95	
Mobile home or trailer	67 [illegible]88	39 [illegible]75	27 [illegible]13	10 [illegible]39	36 [illegible]79	32 [illegible]86	4 [illegible]93
Renter-occupied	2 [illegible]15 [illegible]66	1 [illegible]84 [illegible]66	[illegible]31 [illegible]00	1 [illegible]72 [illegible]92	[illegible]05 [illegible]98	[illegible]35 [illegible]75	9 [illegible]23
1, detached	[illegible]68 [illegible]29	[illegible]45 [illegible]73	62 [illegible]56	[illegible]34 [illegible]75	[illegible]76 [illegible]54	[illegible]67 [illegible]93	4 [illegible]61
1, attached	27 [illegible]67	24 [illegible]64	3 [illegible]03	1 [illegible]54	1 [illegible]13	1 [illegible]35	[illegible]99
2	[illegible]62 [illegible]04	[illegible]41 [illegible]56	61 [illegible]48	[illegible]71 [illegible]43	31 [illegible]57	29 [illegible]43	2 [illegible]14
3 and 4	[illegible]40 [illegible]98	[illegible]81 [illegible]57	39 [illegible]33	[illegible]25 [illegible]51	15 [illegible]39	14 [illegible]64	[illegible]75
5 to 9	[illegible]68 [illegible]09	[illegible]77 [illegible]21	22 [illegible]78	[illegible]92 [illegible]61	7 [illegible]39	7 [illegible]38	-
10 to 19	[illegible]35 [illegible]83	[illegible]23 [illegible]49	11 [illegible]74	[illegible]30 [illegible]83	4 [illegible]30	4 [illegible]30	-
20 to 49	[illegible]71 [illegible]43	[illegible]67 [illegible]96	3 [illegible]61	[illegible]93 [illegible]45	1 [illegible]40	1 [illegible]40	-
50 or more	[illegible]23 [illegible]76	[illegible]17 [illegible]78	4 [illegible]98	[illegible]20 [illegible]78	1 [illegible]26	1 [illegible]26	-
Mobile home or trailer	[illegible]0 [illegible]73	4 [illegible]84	5 [illegible]88	2 [illegible]56	4 [illegible]21	3 [illegible]43	[illegible]73
Year-round vacant for rent	[illegible]95 [illegible]83	[illegible]76 [illegible]86	[illegible]16 [illegible]19	[illegible]82 [illegible]39	[illegible]11 [illegible]33	[illegible]11 [illegible]33	-
1	[illegible]0 [illegible]37	[illegible]5 [illegible]69	[illegible]4 [illegible]68	[illegible]4 [illegible]75	[illegible]5 [illegible]81	[illegible]5 [illegible]81	-
2 to 4	[illegible]31 [illegible]57	[illegible]24 [illegible]76[illegible]	[illegible]6 [illegible]97	[illegible]27 [illegible]40[illegible]	[illegible]3 [illegible]95	[illegible]3 [illegible]95	-
5 to 9	[illegible]2 [illegible]58	[illegible]0 [illegible]39	[illegible]3 [illegible]49	[illegible]1 [illegible]45	[illegible]1 [illegible]43	[illegible]1 [illegible]43	-
10 or more	[illegible]41 [illegible]80	[illegible]38 [illegible]95	[illegible]3 [illegible]85	[illegible]40 [illegible]47	[illegible]1 [illegible]33	[illegible]1 [illegible]33	-
YEAR STRUCTURE BUILT							
All year-round units	6 139 316	5 344 983	814 333	5 333 936	805 410	730 683	84 807
1969 to March 1970	[illegible]01 [illegible]70	[illegible]70 [illegible]63	31 [illegible]08	[illegible]70 [illegible]76	[illegible]30 [illegible]76	[illegible]29 [illegible]38	1 [illegible]36
1965 to 1968	[illegible]35 [illegible]95	[illegible]16 [illegible]71[illegible]	[illegible]40 [illegible]24	[illegible]89 [illegible]57	[illegible]6 [illegible]92	[illegible]2 [illegible]07	4 [illegible]56
1960 to 1964	[illegible]63 [illegible]84	[illegible]92 [illegible]91	[illegible]60 [illegible]93	[illegible]97 [illegible]93	[illegible]6 [illegible]36	[illegible]1 [illegible]69	4 [illegible]77
1950 to 1959	1 [illegible]43 [illegible]36	[illegible]37 [illegible]84	[illegible]25 [illegible]52	[illegible]53 [illegible]44	[illegible]39 [illegible]44	[illegible]30 [illegible]93	8 [illegible]51
1940 to 1949	[illegible]59 [illegible]79	[illegible]09 [illegible]17	30 [illegible]62	[illegible]94 [illegible]71	[illegible]1 [illegible]62	[illegible]1 [illegible]28	4 [illegible]34
1939 or earlier	3 [illegible]24 [illegible]40	2 [illegible]68 [illegible]28	[illegible]15 [illegible]82	2 [illegible]95 [illegible]31	[illegible]20 [illegible]79	[illegible]67 [illegible]99	[illegible]60 [illegible]80
Owner-occupied	3 [illegible]95 [illegible]69	3 [illegible]69 [illegible]56	[illegible]26 [illegible]13	3 [illegible]87 [illegible]43	[illegible]06 [illegible]57	[illegible]33 [illegible]93	73 [illegible]64
1960 to March 1970	[illegible]30 [illegible]83	[illegible]37 [illegible]88	[illegible]2 [illegible]95	[illegible]38 [illegible]29	[illegible]2 [illegible]75	[illegible]0 [illegible]95	1 [illegible]80
1965 to 1968	[illegible]15 [illegible]85	[illegible]73 [illegible]13	[illegible]42 [illegible]72	[illegible]45 [illegible]41	[illegible]0 [illegible]92	[illegible]0 [illegible]34	4 [illegible]390
1960 to 1964	[illegible]94 [illegible]67	[illegible]69 [illegible]71	[illegible]44 [illegible]96	[illegible]28 [illegible]67	[illegible]2 [illegible]70	[illegible]2 [illegible]75	4 [illegible]45
1950 to 1959	[illegible]61 [illegible]93	[illegible]88 [illegible]00	[illegible]51 [illegible]93	[illegible]51 [illegible]43	[illegible]10 [illegible]28	[illegible]07 [illegible]37	3 [illegible]90
1940 to 1949	[illegible]73 [illegible]72	[illegible]30 [illegible]42	[illegible]32 [illegible]90	[illegible]32 [illegible]14	[illegible]1 [illegible]65	[illegible]1 [illegible]78	3 [illegible]25
1939 or earlier	1 [illegible]99 [illegible]96	[illegible]68 [illegible]11	[illegible]31 [illegible]87	1 [illegible]84 [illegible]59	[illegible]94 [illegible]93	[illegible]41 [illegible]34	33 [illegible]25
Renter-occupied	3 [illegible]18 [illegible]80	2 [illegible]84 [illegible]66	[illegible]33 [illegible]14	1 [illegible]72 [illegible]92	[illegible]05 [illegible]93	[illegible]35 [illegible]73	9 [illegible]23
1965 to March 1970	[illegible]81 [illegible]87	[illegible]63 [illegible]73	[illegible]6 [illegible]34	[illegible]88 [illegible]70	[illegible]1 [illegible]58	[illegible]2 [illegible]56	[illegible]62
1960 to 1964	[illegible]43 [illegible]19	[illegible]32 [illegible]71	[illegible]0 [illegible]48	[illegible]33 [illegible]48	[illegible]0 [illegible]71	[illegible]0 [illegible]39	[illegible]32
1950 to 1959	[illegible]34 [illegible]23	[illegible]38 [illegible]88	[illegible]5 [illegible]20	[illegible]37 [illegible]82	[illegible]6 [illegible]41	[illegible]6 [illegible]34	[illegible]07
1940 to 1949	[illegible]60 [illegible]24	[illegible]40 [illegible]76[illegible]	[illegible]9 [illegible]47	[illegible]38 [illegible]23	[illegible]0 [illegible]65	[illegible]0 [illegible]54	[illegible]11
1939 or earlier	1 [illegible]78 [illegible]88	1 [illegible]07 [illegible]23	[illegible]68 [illegible]65	1 [illegible]63 [illegible]65	[illegible]94 [illegible]56	[illegible]41 [illegible]34	3 [illegible]25
COMPLETE BATHROOMS							
All year-round units	6 [illegible]38 [illegible]63	5 [illegible]44 [illegible]86	[illegible]14 [illegible]78	5 [illegible]33 [illegible]83	[illegible]35 [illegible]34	[illegible]46 [illegible]16	[illegible]89 [illegible]18
1	4 [illegible]33 [illegible]49	3 [illegible]54 [illegible]40	[illegible]69 [illegible]09	3 [illegible]55 [illegible]21	[illegible]47 [illegible]68	[illegible]89 [illegible]68	57 [illegible]80
1 1/2	[illegible]90 [illegible]79	[illegible]86 [illegible]97	[illegible]03 [illegible]82	[illegible]96 [illegible]34[illegible]	[illegible]12 [illegible]76	[illegible]02 [illegible]04	11 [illegible]30
2	[illegible]97 [illegible]07	[illegible]07 [illegible]74	45 [illegible]33	[illegible]18 [illegible]22[illegible]	[illegible]4 [illegible]82	[illegible]4 [illegible]19	7 [illegible]45
2 1/2	[illegible]37 [illegible]66	[illegible]39 [illegible]43	13 [illegible]13	[illegible]53 [illegible]46[illegible]	[illegible]2 [illegible]43	[illegible]0 [illegible]14	1 [illegible]28
3 or more	[illegible]27 [illegible]45	[illegible]16 [illegible]35[illegible]	11 [illegible]04	[illegible]12 [illegible]24[illegible]	[illegible]4 [illegible]69	[illegible]4 [illegible]78[illegible]	1 [illegible]19
None or shes used by another household	[illegible]70 [illegible]53	[illegible]19 [illegible]36	51 [illegible]19	[illegible]09 [illegible]27	[illegible]0 [illegible]33	[illegible]5 [illegible]93	3 [illegible]40
Owner-occupied	3 [illegible]95 [illegible]66	3 [illegible]84 [illegible]88	[illegible]33 [illegible]66	3 [illegible]67 [illegible]79[illegible]	[illegible]87 [illegible]73	[illegible]47 [illegible]66	[illegible]73 [illegible]33
1	1 [illegible]28 [illegible]76	1 [illegible]05 [illegible]73	[illegible]43 [illegible]03	1 [illegible]42 [illegible]63[illegible]	[illegible]06 [illegible]33	[illegible]35 [illegible]83	[illegible]8 [illegible]30[illegible]
1 1/2	[illegible]45 [illegible]93[illegible]	[illegible]78 [illegible]68	[illegible]7 [illegible]27	[illegible]68 [illegible]16[illegible]	[illegible]7 [illegible]29	[illegible]6 [illegible]92	[illegible]0 [illegible]65
2	[illegible]77 [illegible]74	[illegible]23 [illegible]43[illegible]	[illegible]5 [illegible]28	[illegible]14 [illegible]27[illegible]	[illegible]4 [illegible]03	[illegible]3 [illegible]74	1 [illegible]29
2 1/2	[illegible]58 [illegible]90	[illegible]49 [illegible]52	[illegible]9 [illegible]38	[illegible]96 [illegible]90[illegible]	[illegible]2 [illegible]74	[illegible]2 [illegible]74	1 [illegible]33
3 or more	[illegible]35 [illegible]97	[illegible]26 [illegible]48	[illegible]8 [illegible]79	[illegible]37 [illegible]69	[illegible]2 [illegible]96	[illegible]2 [illegible]45	4 [illegible]43
Renter-occupied	2 [illegible]18 [illegible]88	1 [illegible]84 [illegible]98	[illegible]33 [illegible]90	1 [illegible]72 [illegible]92	[illegible]05 [illegible]93	[illegible]35 [illegible]73	9 [illegible]43
1	2 [illegible]05 [illegible]39	1 [illegible]54 [illegible]09	[illegible]50 [illegible]30	1 [illegible]14 [illegible]95	[illegible]90 [illegible]44	[illegible]14 [illegible]95	[illegible]75
1 1/2	[illegible]07 [illegible]27	[illegible]97 [illegible]40	[illegible]10 [illegible]87	[illegible]4 [illegible]40[illegible]	[illegible]1 [illegible]78	[illegible]0 [illegible]94	[illegible]84
2	[illegible]58 [illegible]80	[illegible]19 [illegible]97	[illegible]8 [illegible]84	[illegible]19 [illegible]5[illegible]	[illegible]2 [illegible]58	[illegible]2 [illegible]58	[illegible]67
2 1/2	[illegible]76 [illegible]83	[illegible]62 [illegible]56	[illegible]15 [illegible]27	[illegible]65 [illegible]64[illegible]	[illegible]2 [illegible]58	[illegible]1 [illegible]87	[illegible]71
SEWAGE DISPOSAL							
Public sewer	[illegible]84 [illegible]35	[illegible]48 [illegible]48	[illegible]36 [illegible]87	[illegible]84 [illegible]1[illegible]	[illegible]78 [illegible]89	[illegible]42 [illegible]73	2 [illegible]66
Septic tank or cesspool	1 [illegible]39 [illegible]93	[illegible]84 [illegible]98	[illegible]54 [illegible]33	[illegible]48 [illegible]1[illegible]	[illegible]26 [illegible]92	[illegible]06 [illegible]19	79 [illegible]63
Other	[illegible]4 [illegible]88	[illegible]3 [illegible]88	[illegible]0 [illegible]88	[illegible]1 [illegible]7[illegible]	[illegible]0 [illegible]59	[illegible]0 [illegible]54	[illegible]5 [illegible]42
SOURCE OF WATER							
Public system or private company	5 [illegible]54 [illegible]86	5 [illegible]08 [illegible]28[illegible]	[illegible]85 [illegible]58	5 [illegible]28 [illegible]66[illegible]	[illegible]75 [illegible]97	[illegible]01 [illegible]42[illegible]	[illegible]4 [illegible]29
Individual well	[illegible]50 [illegible]54	[illegible]37 [illegible]77	[illegible]12 [illegible]77	[illegible]83 [illegible]44[illegible]	[illegible]47 [illegible]49	[illegible]42 [illegible]68	[illegible]2 [illegible]81
Other	[illegible]4 [illegible]41	[illegible]7 [illegible]78	[illegible]6 [illegible]63	[illegible]2 [illegible]86	[illegible]4 [illegible]44	[illegible]2 [illegible]76	[illegible]0 [illegible]68

Table 36. Equipment and Financial Characteristics for the State: 1970

(Data based on sample; see text. For maximum base for derived figures (percent, median, etc.) and meaning of symbols, see text)

The State Inside and Outside Standard Metropolitan Statistical Areas Urban and Rural, Rural Nonfarm, and Occupied Rural Farm	The State	Inside SMSA's	Outside SMSA's	Urban	Rural		
					Total	Nonfarm	Occupied farm
AIR CONDITIONING							
All year-round units	4 188 661	3 344 186	814 475	3 929 633	826 036	369 718	85 310
Room or window	1 070 733	1 019 381	71 407	1 023 614	67 154	61 839	5 291
Central system	806 512	583 700	21 512	561 414	19 094	17 695	1 249
2 or more	199 83	187 371	12 390	186 024	13 627	12 498	1 129
Other	4 283 710	3 556 564	709 396	3 529 547	735 163	657 666	77 497
HEATING EQUIPMENT							
All year-round units	4 159 314	3 344 803	814 511	3 923 904	835 410	738 663	96 807
Steam or hot water	3 991 449	3 772 630	368 829	3 737 382	254 067	230 794	23 773
Central furnace	1 604 045	1 222 614	381 431	1 194 550	409 495	364 656	44 839
Built-in electric units	87 695	67 755	19 940	83 255	24 440	22 401	2 039
Floor, wall, or pipeless furnace	91 517	68 854	22 663	86 947	24 570	22 124	2 446
Room heaters with flue	265 069	184 810	80 259	190 372	74 699	67 628	7 071
Room heaters without flue	58 676	45 426	13 250	45 644	13 032	11 696	1 336
Fireplaces, stoves, or portable heaters	49 554	26 778	22 673	20 564	29 082	25 188	3 276
None	11 812	6 340	5 466	5 117	6 695	6 588	107
Owner occupied	2 795 669	2 269 654	526 015	2 787 642	668 027	532 943	73 884
Steam or hot water	1 673 721	1 305 951	367 770	1 284 016	169 623	168 499	21 124
Central furnace	1 095 205	816 195	279 010	770 806	324 299	286 092	40 207
Built-in electric units	34 354	21 996	12 358	17 961	16 393	14 567	1 826
Floor, wall, or pipeless furnace	50 724	35 923	14 801	34 056	16 668	14 585	2 083
Room heaters with flue	102 708	65 608	37 108	60 687	42 021	36 234	5 787
Room heaters without flue	20 089	13 627	6 462	12 975	7 114	6 044	1 070
Fireplaces, stoves, or portable heaters	17 995	9 673	8 322	6 448	11 547	8 744	2 803
None	873	689	184	611	262	178	84
Renter occupied	3 118 080	2 904 664	213 416	2 972 992	165 098	135 379	9 723
Steam or hot water	2 285 087	2 207 614	80 473	2 243 514	44 573	41 924	2 649
Central furnace	669 081	569 908	99 173	589 295	59 786	55 284	4 502
Built-in electric units	67 756	62 151	5 105	62 383	6 873	6 660	213
Floor, wall, or pipeless furnace	36 757	30 857	5 900	31 245	5 512	5 149	363
Room heaters with flue	142 727	109 476	33 251	120 698	22 029	20 745	1 284
Room heaters without flue	34 585	29 559	5 026	30 675	3 909	3 691	218
Fireplaces, stoves, or portable heaters	17 173	12 826	4 347	12 890	4 283	3 812	471
None	2 414	2 273	141	2 281	133	110	23
AUTOMOBILES AVAILABLE							
All occupied units	5 913 749	5 174 318	739 431	5 168 749	753 000	667 695	85 306
1	2 583 549	2 170 458	413 091	2 173 667	409 882	361 701	48 181
2	1 098 169	904 280	193 889	853 562	244 607	218 452	26 155
3 or more	170 462	142 048	28 414	138 984	29 478	25 858	3 620
None	2 061 569	1 957 532	104 037	2 002 536	59 033	53 669	5 364
YEAR MOVED INTO UNIT							
Owner occupied	2 795 586	2 269 680	525 906	2 787 791	687 775	532 398	75 377
1969 to March 1970	221 629	172 676	48 949	158 604	63 131	58 469	4 662
1968	152 774	146 300	34 474	134 730	46 044	42 388	3 656
1967	152 254	123 769	28 485	114 828	37 426	34 211	3 215
1965 and 1966	296 604	243 398	53 468	229 394	67 410	61 514	5 896
1960 to 1964	538 522	449 088	89 436	429 158	109 364	98 407	10 957
1950 to 1959	722 785	602 825	120 960	634 780	139 035	122 521	16 514
1949 or earlier	631 802	481 548	150 254	486 437	145 365	114 910	30 455
Renter occupied	3 118 183	2 904 719	213 465	2 972 958	165 335	135 383	9 953
1969 to March 1970	858 211	807 493	50 718	833 398	54 815	52 192	2 623
1968	379 048	349 156	29 892	337 904	31 120	29 974	1 146
1967	287 401	268 408	18 993	275 026	12 375	11 522	853
1965 and 1966	446 659	422 442	24 247	430 245	16 441	15 328	1 113
1960 to 1964	535 256	515 635	21 621	518 910	16 337	15 182	1 155
1950 to 1959	396 352	380 616	17 737	386 207	12 146	11 111	1 035
1949 or earlier	383 225	366 978	16 247	371 234	11 991	9 973	2 018
GROSS RENT							
Specified renter occupied	3 091 086	2 890 794	200 292	2 966 998	124 088	...	...
Less than $30	6 245	5 194	1 051	5 572	673	...	...
$30 to $39	26 304	18 068	2 236	19 227	1 077	...	...
$40 to $49	48 663	42 338	6 325	46 193	2 470	...	...
$50 to $59	94 251	85 682	8 568	90 722	3 529	...	...
$60 to $69	181 357	165 527	15 830	175 007	6 350	...	...
$70 to $79	253 651	235 313	18 338	245 656	7 995	...	...
$80 to $89	313 313	292 484	20 829	302 817	10 496	...	...
$90 to $99	275 967	252 747	23 220	259 565	16 402	...	...
$100 to $109	268 776	259 146	28 629	269 436	20 338	...	...
$110 to $119	275 911	256 154	19 757	259 051	16 860	...	...
$120 to $149	169 412	164 872	4 539	164 861	4 551	...	...
$150 to $199	77 ...	67 436	1 214	67 307	1 307	...	...
$200 or more	77 ...	77 219	564	77 067	776	...	...
Median rent	95 415	95 419	19 982	85 575	19 843	...	...
Median rent	$111	$...	$...	$111	$111	...	...
Median rent	91 144	78 361	15 211	93 621	11 223	...	...
Median rent	...	$...	$...	$...	$...	...	...
Median rent	...	$...	$...	$...	$...	...	...

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"Conclusions" From *Survey Report on Rental Housing*—New York, 1969, Plaintiffs' Exhibit "C".

(See opposite ☞)

CONCLUSIONS

This survey shows that there is still an acute shortage of rental housing in representative areas of New York State subject to rent control.

The survey covered eight municipalities - four in Nassau, two in Westchester and two in Erie Counties. The figures below illustrate the shortages of rental housing in municipalities surveyed in these counties.

Rental Vacancy Rates, by Municipality	
Cedarhurst	1.1%
East Rockaway	0.8
Floral Park	0.8
Great Neck Plaza	0.7
Buffalo [a/]	1.8
Cheektowaga [a/]	1.4
Mount Pleasant	2.8
New Rochelle	0.4

What factors lie behind this tight rental housing supply? Foremost, obviously, has been a lag in new construction relative to the need. In addition, there have been extensive demolitions, many of them caused by urban renewal projects, highway construction and other public improvements.

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a/ For purposes of comparison, a Postal Vacancy Survey (July 1968) obtained rental vacancy rates of 1.1 percent for Buffalo and 1.4 percent in Cheektowaga. An annual occupancy survey conducted by FHA came up with a 1.6 percent rental vacancy rate for Buffalo for the same period.

Also contributing to the attrition were fires and conversions to non-rental usage. Some units were permitted to decay to an extent where they became unfit for habitation. Each of these factors helped to decrease the supply of housing. At the same time, increased demand resulted from new household formations and in-migration.

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"Welfare Housing" From *The Urban Housing Dilemma*, New York City, Plaintiffs' Exhibit "D".

Welfare Housing

Introduction

The significance of providing housing for welfare recipients is self-evident in a city where one out of every eight residents is "on welfare." The following material analyzes the specifics of the welfare housing market. First the types and condition of housing presently offered welfare recipients are considered, then the characteristics and the attitudes of their landlords, financing problems, and, finally, "welfare" housing operations.

The sources for the data used on welfare housing are the landlord interviews. Owners were asked if they had any tenants on welfare in the sample structure and in what proportion. Spot checks of the reliability of the owners' reports were conducted with the help of the Human Resources Administration. In general, they were quite accurate.

A more intensive analysis of this area is being prepared as part of a study being conducted with the cooperation of the Housing Development Administration, the Human Resources Administration, and the Ford Foundation.

Plaintiffs' Exhibit D, "Welfare Housing" From The Urban Housing Dilemma, New York City.

Condition of Housing

Exhibit 1 indicates the skew in distribution of welfare tenantry by building characteristics. Seventy-five percent or more of the Post 1929 structures have no welfare tenantry. This contrasts with a minority of the Old Law and intermediate sized New Law structures which are similarly tenanted.

More than one of five of the Old Law and intermediate sized New Law structures have 20 percent or more of their tenants on welfare. This points up the concentration of welfare recipients in the poorer rent controlled housing.

It is difficult to disentangle the effects of availability of housing, segregation, discrimination against not only ethnic minorities but also welfare recipients, and absolute rent levels. *Regardless of the several inputs into the mix, there is no question of the concentration of the welfare tenantry in the City's oldest and poorest categories of housing.*

In a structured probability sample of welfare recipients conducted in 1966 in New York City,[1] only 11 percent of the welfare families lived in public housing. About one-third of the welfare mothers in this study reported that

[1] Lawrence Podell, *Families on Welfare in New York City*, preliminary report #2, City University of New York, N.Y. 1967.

Exhibit 1, Welfare.

(See opposite page)

Exhibit 1 - Welfare

WELFARE TENANTRY BY BUILDING CATEGORY (WEIGHTED NUMBER OF STRUCTURES) NEW YORK CITY, 1968

(NUMBERS OF STRUCTURES IS IN HUNDREDS)

Welfare Tenantry	All Structures	Old Law Structures		New Law Structures			Structures Built After 1929		Small Structures
		5 - 19 Units	20 Units or More	5 - 19 Units	20-49 Units	50 Units or More	10-49 Units	50 Units or More	3 and 4 Units
Total	529	133	18	119	97	24	7	11	119
None	259	58	6	67	25	12	6	8	78
A Few (Less than 10%)	44	11	3	7	15	6	1	2	0
10% Plus to 20%	40	11	2	10	16	1	*	0	0
20% Plus to 50%	88	19	2	21	23	2	*	*	21
Over 50%	38	13	2	5	8	1	0	0	10
Some - No Breakdown	41	16	3	8	10	2	*	0	3
NA/DK	19	6	1	1	2	1	*	1	7
P E R C E N T D I S T R I B U T I O N									
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
None	48.9	43.5	33.3	56.0	25.3	48.5	79.5	75.0	65.3
A Few (Less than 10%)	8.3	8.2	18.9	5.5	15.2	23.7	9.1	18.5	0.0
10% Plus to 20%	7.5	8.2	8.9	8.8	16.2	4.1	1.1	0.0	0.0
20% Plus to 50%	16.6	14.1	8.9	17.6	23.2	9.3	2.3	1.1	18.1
Over 50%	7.1	9.4	8.9	4.4	8.1	2.1	0.0	0.0	8.3
Some - No Breakdown	7.8	11.8	15.6	6.6	10.1	7.2	2.3	0.0	2.8
NA/DK	3.7	4.7	5.6	1.1	2.0	5.2	5.7	5.4	5.6

*LESS THAN 50

NOTE: NUMBERS MAY NOT ADD PRECISELY BECAUSE OF ROUNDING.

Source: Landlord Survey; Rent Controlled Structures Only.

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"Welfare Housing" From The Urban Housing Dilemma.

"there were rats in their buildings"; garbage was found in the hallways of the buildings in similar proportions. Forty-six percent of the families on welfare lived in housing with poorly lit hallways.

The problems of providing housing accommodations for welfare recipients are accentuated, particularly in the cases of ADC families, by the large size of the families. Two-thirds of the families had three or more children. As a result, many welfare recipients are overcrowded. Fifteen percent of the households had two or more people per room and an additional 17 percent had from one and one-half to 1.99 persons per room.

This is further complicated by the rent levels. Only a quarter of the welfare families pay between $80 and $100, with an additional fifth paying over $100 per month. What do they receive for their rent payments?

Exhibit 2 clearly indicates a correlation between welfare tenancy and poor housing conditions. *Over fifty percent of the structures in the lowest interior maintenance category have a high proportion of welfare tenants.* Conversely, nearly 90 percent of the top category of maintenance graded buildings have either none or a few—less than 10 percent—welfare recipients as tenants.

Exhibit 2—Welfare.

(See opposite ☞)

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CONDITION OF STRUCTURES BY DEGREE OF WELFARE TENANTRY (WEIGHTED NUMBER OF STRUCTURES) NEW YORK CITY, 1968
(NUMBER OF STRUCTURES IS IN HUNDREDS)

Exhibit 2 - Welfare

Degree of Welfare Tenantry	All Structures	NUMBER OF STRUCTURES BY INTERIOR MAINTENANCE SCALE 1-59	60-75	76-89	90-100
Total	524	93	201	173	57
None	255	14	86	112	44
A Few (Less than 10%)	44	4	20	14	7
10 - 20%	40	6	15	17	2
20 Plus - 50%	88	34	37	16	1
Over 50%	36	19	17	*	0
Some - No Breakdown	41	9	21	9	3
NA/DK	19	8	7	4	1
PERCENT DISTRIBUTION					
Total	100.0	100.0	100.0	100.0	100.0
None	48.7	14.6	42.5	64.8	77.4
A Few (Less than 10%)	8.4	4.4	9.7	7.9	11.9
10 - 20%	7.6	6.3	7.3	10.1	3.4
20 Plus - 50%	16.8	36.3	18.6	9.2	1.7
Over 50%	6.9	20.6	8.3	0.1	0.0
Some - No Breakdown	7.9	9.5	10.2	5.5	4.5
NA/DK	3.7	8.4	3.4	2.4	1.1

*LESS THAN 50
NOTE: NUMBERS MAY NOT ADD PRECISELY BECAUSE OF ROUNDING.

This exhibit also appears in the chapter on Maintenance as Exhibit 29.

Source: Landlord Survey; Rent Controlled Structures Only.

"Welfare Housing" From The Urban Housing Dilemma.

When the owners were unequivocally asked, "Is your building in good condition?", nearly three-fourths of those with no welfare recipients said unequivocally "yes," while only 52.6 percent of those with half or more welfare recipient tenants were similarly positive. (See Exhibit 3.)

Violations—Three-fourths of the structures with over 50 percent welfare recipients had five or more violations. The same is true for 45.1 percent of the 20-50 percent welfare tenanted buildings. This contrasts sharply with equivalent data for structures with no welfare tenants where the incidence of 5 or more violations is 22.2 percent. Since welfare workers are required to try to place their clients only in violation-free structures, it is apparent that the relatively tight market cannot provide alternative, violation-free, accommodations for people on welfare (See Exhibit 4.)

Are these buildings violation-free before they have welfare tenantry, or are the buildings open to welfare tenants because they *do* have violations and are unacceptable to other tenants? Much more intensive research is required before these pertinent questions can be answered. In any case, to the extent that violations are linked with poorly maintained buildings, most welfare recipients live in badly maintained housing.

Exhibit 3, Welfare.

(See opposite ☞)

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Exhibit 3 - Welfare

"IS YOUR BUILDING IN GOOD CONDITION?" BY DEGREE OF WELFARE TENANTRY (WEIGHTED NUMBER OF STRUCTURES) NEW YORK CITY, 1968

(NUMBER OF STRUCTURES IS IN HUNDREDS)

Building in Good Condition?	All Structures	NUMBER OF BUILDINGS BY DEGREE OF WELFARE TENANTRY				
		None	Less Than 10%	10-20%	20 Plus-50%	Over 50%	Some - No Breakdown	NA/DK
Total	520	250	44	40	88	28	41	19
Yes	369	191	32	31	56	20	22	17
No	62	27	4	3	12	7	10	•
Equivocation	51	17	8	4	11	8	4	•
Fair	40	22	•	3	9	2	4	1
NA/DK	7	2	0	0	0	2	2	1
	PERCENT DISTRIBUTION							
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Yes	69.8	73.8	73.6	77.7	63.7	52.6	53.6	88.5
No	11.7	10.3	8.6	6.4	13.9	18.9	23.1	1.4
Equivocation	9.6	6.4	17.4	10.2	12.5	20.4	8.6	1.0
Fair	7.5	8.6	0.5	5.7	10.0	4.2	10.0	2.6
NA/DK	1.3	0.9	0.0	0.0	0.0	4.4	4.8	6.5

*LESS THAN 50

NOTE: NUMBERS MAY NOT ADD PRECISELY BECAUSE OF ROUNDING.

Source: Landlord Survey: Rent Controlled Structures Only.

THE "WELFARE" LANDLORD

Who are the "welfare' landlords? Is there a significant skew in the distribution of owner characteristics as the proportion of welfare tenantry rises?

Minority Group Owners—As noted in Chapter 13 minority group owners have most of their holdings in the oldest, smallest, and least expensive apartment facilities where, as we have seen, welfare recipients are housed. Exhibit 5 clearly illustrates this. Notice the increase in minority group ownership as the proportion of welfare recipient tenantry goes up.

Only a quarter of the Spanish-speaking owned buildings reported no welfare tenantry, as contrasted with more than half the white non-Spanish and Negro owned buildings. The majority of the Spanish-speaking owners have parcels with over 20 percent of the tenants on welfare. Over a fifth of the buildings which have over 50 percent welfare tenants have Spanish-speaking owners. Minority group owners, therefore, are housing a substantial proportion of the heavily welfare tenanted buildings.[2]

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[2] The size of sample for minority group landlords is very small (18 Spanish-speaking, 40 Negro). These findings, therefore, are more suggestive than definitive.

Exhibit 3, Welfare.

(See opposite [illegible])

MAXIMUM MONTHLY CONTROLLED RENT PER AVERAGE APARTMENT IN STRUCTURES (1967) BY DEGREE OF WELFARE TENANTRY (WEIGHTED NUMBER OF STRUCTURES) NEW YORK CITY, 1967
(NUMBER OF STRUCTURES IS IN HUNDREDS)

Degree of Welfare Tenantry	*All Structures*	*Maximum Monthly Controlled Rent Per Average Apartment in Structures (1967)*										
		Percentiles									*Interquartile Range (25%-75%)*	*Mean*
		10	*20*	*30*	*40*	*50*	*60*	*70*	*80*	*90*		
Total	529											
None	259	$38	$48	$53	$57	$62	$66	$71	$79	$91	$50-$75	$64.64
A Few (Less than 10%)	44	32	36	45	48	60	65	71	75	81	42- 73	57.92
10%-20%	40	32	50	53	55	62	65	70	74	77	52- 71	60.67
20% Plus to 50%	88	38	45	50	52	56	60	65	68	74	47- 66	56.20
Over 50%	38	37	45	53	57	63	66	74	76	80	47- 76	61.14
Some—No Breakdown	41	28	48	52	52	53	62	70	76	78	49- 72	56.68
NA/DK	19	33	37	43	49	57	68	71	80	83	43- 80	58.28

NOTE: Numbers may not add precisely because of rounding.
Source: New York City Office of Rent Control; Landlord Survey; Rent Controlled Structures Only.

NUMBER OF VIOLATIONS BY DEGREE OF WELFARE TENANTRY (WEIGHTED NUMBER OF STRUCTURES) NEW YORK CITY, 1968

(NUMBER OF STRUCTURES IS IN HUNDREDS)

Welfare Tenantry	All Structures	NUMBER OF VIOLATIONS None	1 to 4	5 and Over
Total	529	183	166	180
None	259	102	99	57
A Few (Less than 10%)	44	16	12	17
10 - 20%	40	14	12	14
20 Plus - 50%	88	23	25	40
Over 50%	37	6	4	28
Some - No Breakdown	41	12	10	19
NA/DK	19	9	5	5
P E R C E N T D I S T R I B U T I O N				
Total	100.0	34.6	31.4	34.0
None	100.0	39.6	38.3	22.2
A Few (Less than 10%)	100.0	35.5	26.3	38.2
10 - 20%	100.0	35.7	29.5	34.8
20 Plus - 50%	100.0	26.1	28.8	45.1
Over 50%	100.0	15.5	9.4	75.1
Some - No Breakdown	100.0	30.1	23.5	46.4
NA/DK	100.0	48.5	28.1	23.4

NOTE: NUMBERS MAY NOT ADD PRECISELY BECAUSE OF ROUNDING.

Source: Special Listing of the Master Building File, August, 1967; Landlord Survey; Rent Controlled Structures Only.

"Welfare Housing" From The Urban Housing Dilemma.

Resident Landlords—Landlords occupy buildings that are heavily welfare tenanted less frequently than they do buildings with no welfare. In the sample as a whole, for example, in buildings with 20 percent or more welfare, landlords are present in approximately one out of six cases. This skew in distribution between welfare and no welfare resident landlords, is largely a function of the relatively small three- and four-unit buildings which have no welfare tenants. For larger parcels the degree of resident ownership is roughly the same regardless of welfare tenantry. (For more data on this point see Chapter 13.)

The Degree of Owner Involvement in the Real Estate Market—If responses are tabulated by the proposition of welfare tenantry in the structure, there is little variation in the amount of income received from real estate. Similarly, there is little variation in the degree of owner involvement as gauged by the amount of time devoted to real estate holdings or in size of holdings.

The Financing of "Welfare" Buildings

As more fully detailed in Chapter 11, *Financing*, funds available for repairs, and cash flow strains on structures are chiefly a function of their financing. In this context, then, the data in Exhibit 6 are highly significant.

Exhibit 6, Welfare.

(See opposite ☞)

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Exhibit 6 - Welfare

"WHEN YOU BOUGHT THIS PARCEL WAS ADEQUATE INSTITUTIONAL FINANCING AVAILABLE?"
BY DEGREE OF WELFARE TENANTRY (WEIGHTED NUMBER OF STRUCTURES) NEW YORK CITY, 1968
(NUMBER OF STRUCTURES IS IN HUNDREDS)

Landlords Response	All Structures	DEGREE OF WELFARE TENANTRY: None	Less Than 10%	10-20%	20 Plus-50%	Over 50%	Some - No Breakdown	NA/DK
Total	529	259	44	40	88	38	41	19
Yes	376	197	33	27	61	18	28	12
Partly-Had to be supplemented	9	4	2	1	2	0	0	0
No-Substantially purchase money	32	14	•	4	9	5	•	0
No	55	18	5	4	12	9	6	2
NA/DK	57	26	3	4	4	6	8	6
PERCENT DISTRIBUTION								
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Yes	71.1	76.3	75.7	68.2	69.6	46.7	67.3	59.4
Partly-Had to be supplemented	1.6	1.5	5.2	2.5	1.9	0.0	0.0	0.0
No-Substantially purchase money	6.0	5.5	1.0	8.9	10.0	12.2	1.0	0.0
No	10.4	6.8	10.6	9.5	14.2	24.9	13.3	9.4
NA/DK	10.8	10.0	7.6	11.0	4.3	16.2	18.5	31.2

•LESS THAN 50
NOTE: NUMBERS MAY NOT ADD PRECISELY BECAUSE OF ROUNDING.

"Welfare Housing" From The Urban Housing Dilemma.

The positive correlation between the weakness of the institutional financing pattern and the proportion of welfare tenantry is obvious. Only 12.3 percent of the non-welfare buildings had no institutional financing at the time of purchase, or required substantial purchase money. By contrast, the proportion responding similarly in those buildings with over 50 percent welfare is triple, at the 37.1 percent mark.

Purchase money mortgages tend to be shorter term, commonly involving much higher actual interest rates, and are typically self-liquidating. They, therefore, exercise a deleterious effect on the economics and operations of structures in which they are common. To the extent that this is the type of financing available for "welfare" buildings, it is obvious that these same buildings will have a much harder time in terms of cash flow requirements than those buildings whose owners have access to institutional financing.

The response to the question detailed above was paralleled and emphasized when owners were asked if they could get a mortgage presently. Less than 45 percent of those with no welfare tenantry said that they could obtain institutional financing. (Exhibit 7.) Only one-fourth of those buildings with 20 to 50 percent welfare tenantry gave a similar response, and the proportion was reduced to 17.1 percent for those with over 50 percent welfare tenants.

"If Selling Now, Would It Be Possible to Get a Mortgage From a Lending Institution".

(See opposite ☞)

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"IF SELLING NOW, WOULD IT BE POSSIBLE TO GET A MORTGAGE FROM A LENDING INSTITUTION?"
BY DEGREE OF WELFARE TENANTRY (WEIGHTED NUMBER OF STRUCTURES) NEW YORK CITY, 1968
(NUMBER OF STRUCTURES IS IN HUNDREDS)

Landlords Response	All Structures	DEGREE OF WELFARE TENANTRY				
		None	Less Than 10%	10-20%	20 Plus-50%	Over 50%	Some - No Breadkown	NA/DK
Total	529	259	44	40	88	38	41	19
Yes	184	115	17	12	22	6	7	5
No	252	97	20	22	56	25	23	9
NA/DK	94	47	7	6	10	6	12	6
PERCENT DISTRIBUTION								
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Yes	34.7	44.3	38.5	28.9	25.5	17.1	16.0	26.0
No	47.6	37.4	46.4	55.6	63.6	66.5	54.6	44.6
NA/DK	17.7	18.2	15.0	15.4	10.9	16.4	29.4	29.4

NOTE: NUMBERS MAY NOT ADD PRECISELY BECAUSE OF ROUNDING.

Source: Landlord Survey; Rent Controlled Structures Only.

This suggests that the welfare building owner is driven to essentially playing end game. He cannot get out of a parcel since he cannot get financing for an appropriate sale. Under these circumstances, the owner's level of maintenance and capital input will probably be quite limited.

The factors that enter into the mortgagability of a parcel are complex. As Chapter 11, *Finance* details, the location of the structure, its age and physical configuration, and a host of other elements are significant. Few of the nearly 100 mortgage officers interviewed in this survey made specific reference to welfare. In general, however, when these comments were forthcoming, they were specifically negative. The attitude was epitomized by the president of a major savings and loan, when discussing a mortgage held by his institution in the East New York area of Brooklyn. "The trend indicates no further extension (of the mortgage) even though the building is in fair condition; the neighborhood is not really too good. Welfare occupancy has hurt its value." The attitude expressed by this lender may be unfair, but it was common among the entrepreneurs and lenders in the survey when welfare tenancy was mentioned.

When landlords were asked whether they had any welfare tenantry, a frequent response among owners of well cared for buildings was "No! I won't take any in the building." Whether correct or not, there seems to be a strong feeling on the part of the landlords that taking in welfare tenants marks the beginning of the deterioration of the building.

The possibility of this being a self-fulfilling prophecy is evident—the landlord is sure that welfare tenants bring on the ruin of a building, and therefore, with their entrance, does not maintain the building. The potential of this forecast needs little elaboration here, but it has obvious significance.

> Interestingly enough, this is not confined simply to rent controlled parcels. For example, Parcel No. 7211001 is an eight-family, brick, four-story walk-up which was radically altered and thus decontrolled. It is located in the border ground between the Williamsburg and the Bedford Stuyvesant areas of Brooklyn. The eight apartments located within its 5,340 square feet have a total rent roll, when fully occupied, of $8,448. Six of the eight households are black, more than half are on welfare. The owner, a major holder and operator of real estate with nearly 40 buildings, all in Brooklyn, claims that he would like to sell the building but no one would buy it.
>
> The owner secured the building in lieu of foreclosure in May 1967. His attitude toward improvements and the like are as negative as any rent controlled owner's. When asked if he would be able to get a mortgage on a sale, the response was "No, absolutely impossible because of the deterioration of the area." He also pointed to the necessity for him to house welfare recipients as "the only people who want to live here."

It is interesting to note that in the same neighborhood there is an eight-family, brick, similar rent controlled building with an assessment within dollars of the non-controlled building. The owner-resident in this all white, non-welfare tenanted building has a bank mortgage and felt confident that he could get a larger one, if necessary, on resale.

The maximum rent on the latter structure with its 8,608 square feet of building area was only $7,500 a year. Obviously, the negative variable in the non-controlled case

could not have been rent control, except perhaps as rent control keeps rents artifically low in the area generally. The essential variables seem to be tenant ethnicity, welfare, and owner residence. In the controlled case, the owner resident bought the building partly for income, but mostly as a home. In the non-controlled case, the latter motivation and supervision were missing.

For the least desirable buildings, however, welfare tenantry is essential. As detailed in Chapter 12, *Tax Delinquency and Vacant Buildings,* the ability to secure welfare tenants frequently has a life and death effect on the operations of a building. For example, in one case in the East New York area of Brooklyn, a building was abandoned by its owners. They made the decision not to repair after a fire, partly because of an estimated six-to eight-month gap between repairing the building and removing the rent reductions. In addition, "as long as the building had violation restrictions on it after repairs were made, no welfare tenants could be put in the building and welfare tenants are the main source of income in this area." Obviously, this illustrates the existence of a distinct welfare market.

Adequacy of Welfare Allowances for Shelter

At the time of this study current standards for welfare shelter allowances are affected by the scarcity of housing. The nominal limits were as follows for unfurnished units with private kitchen, toilet facilities and central heat: welfare rent allowances for one person go up to $100 a month; for two or othree persons, $110 a month; four or five persons, $135 a month; for six persons, $150 a month; for seven or eight persons, $160 a month; for nine persons and over, $185 monthly. Payments over this are paid only with permission of the administrative supervisor.

While there is no stipulation as to the number of rooms, the *Handbook for Case Units and Public Assistance of the City of New York, Department of Social Services,* as of the time of the study, states, "the adequacy of the living arrangements in terms of the number of rooms and persons in the household should be carefully considered and discussed with housing advisors when there is a question as to adequacy. A similar recommendation applies to accommodations without central heat, where the rents are usually $25 a month less.

In a number of cases, landlords, when asked about potential rent increases, replied that the ceiling was not rent control, but how much welfare would pay. The high rate of tenant turnover in welfare structures had made the rent control ceilings much less confining than the willingness of the welfare administration to pay high rents. Several owners of slum properties noted that welfare authorities now avoid placing tenants in some of the hard core slum areas. In one case, for example, an owner complained that the welfare agency in the Bronx no longer recommended clients to his neighborhood; i.e., the South Bronx.

Similarly, one landlord of a 20-family house in the Bedford-Stuyvesant area has 18 of his units occupied by welfare clients (Parcel 121001). When pointing to a large number of his units renting for less than the maximum legal rent, he said, "Welfare will only pay $105 for four rooms." Since he has had a very high turnover, his ceilings are well above this. The same landlord pointed to rent increases received through turnover as a reason for not putting in additional services. "I don't bother with additional services since there is such a large turnover because I have welfare tenancy."

"Welfare Housing" From The Urban Housing Dilemma.

His average rental for four-room units was more than $100 a month. He stated further that "My building is decontrolled due to the constant turnover from welfare tenants and the 15 percent lease increases." The Negro owner added that if there were no rent control he'd raise the rents even further, get rid of his welfare tenants, and straighten up the building in such a fashion as to attract other tenants whom he feels he could get profitably.

Vigor of Rentals as a Function of Welfare Tenantry

When landlords' responses to the question of whether it was harder or easier to rent are cross tabulated by the degree of welfare tenantry (see Exhibit 8), there is a clearcut correlation between the amount of welfare tenantry and the degree of affirmative responses to "getting harder to rent." The proportion among those who have no welfare tenants who said it was harder to rent was 17 percent. This goes up to 37 percent of those owners who have from a fifth to a half of their tenantry in welfare households, and 38.7 percent for those over the 50 percent level.

Exhibit 8, Welfare.

(See opposite [illegible])

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"HAS IT GOTTEN HARDER OR EASIER TO RENT IN THE LAST TWO YEARS IN THE GENERAL AREA?"
BY DEGREE OF WELFARE TENANTRY (WEIGHTED NUMBER OF STRUCTURES) NEW YORK CITY, 1968
(NUMBER OF STRUCTURES IS IN HUNDREDS)

Exhibit 8 - Welfare

Landlords Response	All Structures	DEGREE OF WELFARE TENANTRY: None	Less Than 10%	10-20%	20 Plus-50%	Over 50%	Some - No Breakdown	NA/DK
Total	529	259	44	40	88	38	41	19
No Change	245	136	25	16	32	15	16	5
Harder	126	44	10	9	33	15	12	6
Easier	116	58	9	8	18	8	9	6
No Change but poorer tenantry	23	10	*	5	2	0	5	1
NA/DK	18	10	1	3	4	0	0	1
PERCENT DISTRIBUTION								
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
No Change	46.3	52.7	56.3	40.0	36.1	39.6	38.8	27.1
Harder	23.9	17.0	21.9	21.4	37.0	38.7	27.8	29.3
Easier	21.9	22.5	19.5	19.9	20.0	21.8	21.8	31.3
No Change but poorer tenantry	4.4	3.8	1.0	12.2	2.4	0.0	11.6	6.8
NA/DK	3.5	4.0	1.2	6.6	4.5	0.0	0.0	5.5

*LESS THAN 50
NOTE: NUMBERS MAY NOT ADD PRECISELY BECAUSE OF ROUNDING.

Source: Landlord Survey: Rent Controlled Structures Only

"Welfare Housing" From The Urban Housing Dilemma.

When owners were asked whether they could get more for *all* of their apartments without exception, and the answers were tabulated by welfare tenantry, there was little variation in the response. The weakest market indications came from those buildings with 20-50 percent welfare occupancy. The reasons given by the owners were typically those of apartment configuration, particularly that the apartments were inappropriate to the new market. Examination of the questionnaires indicated that they referred to apartments which were quite small and located in areas of ethnic shift where the premium was on large size units. (See Exhibit 9.)[3]

Welfare and Segregated Structures

It is clear from Exhibit 10 that buildings which were heavily welfare tenanted tend to be segregated. While only 6.8 percent of all white tenanted buildings had over 20 percent welfare recipients, 37.3 percent of all Negro buildings, 59.2 percent of all Spanish, 49.5 percent of the mostly Negro tenanted buildings, and 48.0 percent of the mostly Spanish occupied buildings were so tenanted.

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[3] The absolute negative response to the projective question, "in your neighborhood" is probably more trustworthy than a question on the owner's specific building.

Exhibit 9, Welfare.

(See opposite ☞)

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"COULD YOU GET MORE FOR ALL YOUR APARTMENTS?"
BY DEGREE OF WELFARE TENANTRY (WEIGHTED NUMBER OF STRUCTURES) NEW YORK CITY, 1968
(NUMBER OF STRUCTURES IS IN HUNDREDS)

Exhibit 9 - Welfare

Landlords Response	All Structures	DEGREE OF WELFARE TENANTRY: None	Less Than 10%	10-20%	20 Plus-50%	Over 50%	Some - No Breakdown	NA/DK
Total	502	244	43	37	84	36	40	18
More without exception	378	188	31	31	57	31	25	15
Exception - Location	7	5	•	•	2	•	•	0
Apartment Configuration	20	5	1	1	7	1	4	0
Building Configuration	23	9	1	1	6	1	4	0
Apartments already at market value	62	29	8	4	11	2	5	4
Tenants can't afford to pay	1	0	0	0	1	0	0	0
NA/DK	11	7	2	0	•	0	1	•
PERCENT DISTRIBUTION								
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
More without exception	75.2	77.2	72.0	83.2	67.8	86.8	62.2	79.7
Exception - Location	1.5	2.0	0.3	0.5	1.9	1.2	0.6	0.0
Apartment Configuration	4.0	2.2	3.3	2.7	8.2	3.3	10.0	0.0
Building Configuration	4.6	3.9	1.3	3.2	7.7	3.3	10.3	0.0
Apartments already at market value	12.4	11.7	19.0	10.4	13.0	5.4	12.5	19.6
Tenants can't afford to pay	0.2	0.0	0.0	0.0	1.2	0.0	0.0	0.0
NA/DK	2.2	3.0	4.0	0.0	0.2	0.0	3.6	0.7

•LESS THAN 50
NOTE: NUMBERS MAY NOT ADD PRECISELY BECAUSE OF ROUNDING.

Source: Landlord Survey; Rent Controlled Structures Only.

Exhibit 10, Welfare.

(See opposite ☞)

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ETHNICITY OF TENANTS BY DEGREE OF WELFARE TENANTRY (WEIGHTED NUMBER OF STRUCTURES) NEW YORK CITY, 1968

(NUMBER OF STRUCTURES IS IN HUNDREDS)

Degree of Welfare Tenantry	All Structures	ETHNICITY OF TENANTS: All White	All Negro	All Spanish	Subst. Negro (Bal. Mixed)	Subst. White (Bal. Mixed)	Subst. Spanish (Bal. Mixed)	Mixed Spanish (Other Whites)	All Three Mixed	No Answer Do Not Know
Total	529	205	82	37	38	34	30	45	39	19
None	259	155	29	7	10	17	5	13	16	6
A Few (Less than 10%)	44	13	4	2	3	6	3	6	2	4
10 - 20%	40	13	4	3	1	3	5	3	8	0
20 Plus - 50%	88	13	21	8	13	2	12	11	5	3
Over 50%	38	1	9	14	5	2	2	3	1	0
Some - No Breakdown	41	7	10	4	4	4	2	5	4	2
NA/DK	19	1	4	0	1	*	2	4	3	5
		PERCENT DISTRIBUTION								
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
None	48.9	76.0	35.3	18.1	27.2	50.0	15.2	29.6	40.5	33.8
A Few (Less than 10%)	8.3	6.5	5.5	5.4	7.8	18.5	9.7	14.0	5.6	18.4
10 - 20%	7.5	6.6	4.5	7.9	2.8	9.9	16.0	6.4	19.5	0.0
20 Plus - 50%	16.6	6.2	25.8	21.5	35.4	4.8	40.7	23.5	13.5	15.8
Over 50%	7.1	0.6	11.5	37.7	14.1	4.8	7.3	6.5	1.7	0.0
Some - No Breakdown	7.8	3.3	12.3	9.5	11.4	10.7	5.5	12.0	11.2	8.2
NA/DK	3.7	0.7	5.1	0.0	1.3	1.3	5.6	7.8	8.1	23.8

*LESS THAN 50

NOTE: NUMBERS MAY NOT ADD PRECISELY BECAUSE OF ROUNDING.

Source: Landlord Survey; Rent Controlled Structures Only.

The impact of twice minority status, both in terms of ethnicity and in terms of welfare status, compounded by substantial segregation within one physical structure, is beyond the scope of this study. It certainly deserves much more analysis and action on the part of municipal authorities.

Some Operational Aspects of Welfare Structures

It is difficult to separate the impact of ethnic shift and welfare shift. To some owners they are synonymous. One owner of an all white building in the Fort Hamilton Park area of Brooklyn contrasted her lot (with white stable tenantry, and, therefore, no lease turnover) and that of some of her neighbors who were beginning to take in minority groups as well as welfare recipients. Although the high turnover of welfare tenants would increase her revenues, when asked why she didn't make the tenant shift, she looked shocked and said, "They will ruin the building."

Welfare and the problem of Non-Payment of Rent

A frequent criticism voiced by a number of owners in the sample was that the Welfare Department didn't take adequate responsibility for the payment of rent by welfare tenants. Welfare payments are made twice monthly, rents typically are collected once a month; the strain on budgeting is clear. The department has tried to minimize the use of two party checks; i.e., made out jointly to the tenant and the landlord. This reason was cited by a number of landlords as basic in refusing to accept welfare tenants.

The problem of the landlord in hard core slum areas with welfare tenantry is illustrated in the example of a frame, three-family house in very bad condition in a hard core slum in the Bronx.

> Parcel #153009. The non-resident owner is a dentist. He owns three buildings next to each other, all in similar condition. The tenants, all Negro, are all on welfare. He complained bitterly of failures to pay rent, claiming that nearly 50 percent of the normal rent roll is uncollectable. However, he pointed out that he continues tenancy despite non-payment of rent for fear of vandalism. "If you empty an apartment in this area, you'll end up with a ruined building." It should be noted that this particular building, given miximum legal rents even if collectable, would still have a negative contribution to debt, depreciation, and profit because of very high tax payments as well as substantial costs of repairs and maintenance.

There is obviously some variation in the response of welfare offices to this problem. One very professional, hard-boiled manager of a six-story, walk-up, 20-family, Old Law building in the Williamsburg area of Brooklyn, gave this summary of his operational approach: "It is our policy to issue dispossess orders if a tenant doesn't pay his rent within a month after the due date. We don't always carry them out, but the tenant can show the order to the Welfare Department and get money to pay the rent. It's a pretty good method to enforce rent payments."

The agent usually issues 20 dispossess orders per year in this 20-family house and carries out about two or three of them. The cost per unit is running about $150 in legal and moving expenditure plus two or three months of lost rent. Losses in rent collections have run between five and ten percent per year on a rent roll of $600 per month.

Despite this punitive policy, the building is currently in tax foreclosure proceedings, having been abandoned by the owner because of tenant destructiveness. Whether a less

punitive approach might have yielded better results can be left to the reader's judgment.

Significantly, owners who accept partial payments of rent or collect weekly, frequently had welfare tenantry.

Welfare Tenancy and Rent Levels

One of the questions that opponents of rent control have raised is whether it has artificially stimulated an influx of poor from around the country into New York. Obviously, the causes of the great internal migration within the United States and Puerto Rico are far more complex than this study can encompass. There are simply very limited accommodations, other than rent controlled ones, which are within the budgets of people with incomes much under $8,000 in New York City. Housing availability, however, is merely one among several factors in the migration. The question remains of whether higher rents would have discouraged the migration of low income individuals or merely caused more overcrowding and deterioration of housing for the poor. (See Exhibit 11 for the type of housing accommodation, by control status of people who have migrated to New York City.)

Certainly, however, rent control laws have had effects, some unanticipated, on "welfare" structures, as indicated by the utilization of the rent change mechanisms.

Exhibit 11, Welfare.

(See opposite ☞)

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Exhibit 11 - Welfare

PREVIOUS ADDRESS OF HEAD OF HOUSEHOLD IN CONTROLLED vs. TOTAL RENTER HOUSING STOCK, NEW YORK CITY, 1968

	Same Structure	Other Structure Same Borough	New York City Other Borough	Connecticut, N.J., N.Y.S.	Elsewhere
Rent Controlled Units	4.8%	76.6%	11.6%	2.1%	4.8%
Total Rental Units	3.9%	75.1%	13.0%	2.9%	5.1%

Source: New York City Housing and Vacancy Survey, 1968, Series III, Table F 6.

Means of Securing Rent Increments as a Function of Degree of Welfare Tenantry

Analysis of the rent control records gives considerable insight on landlord inputs into "welfare" structures. It is clear that these have been small, while the lease increase provisions of the rent control law have substantially benefitted high welfare structures.

The degree of lease increase secured from 1963 to 1967 is substantially in accordance with the degree of welfare tenantry (Exhibit 12). The mean increase for those buildings which have no, or just a few, welfare tenants as a function of lease change was $3.25 a month, per apartment. In the buildings which had 10 to 20 percent welfare, the increment was $4.12. In the structures with 20 percent or more welfare tenantry, there is a substantial upward shift in range. For the 20-50 percent welfare tenanted structures the mean increase was $4.77, while for the over 50 percent welfare tenantry the lease increase from 1963 to 1967 was $5.89. The interquartile ranges substantially carry out the analysis and are confirmed by observation of the median data.

A completely opposite relationship is evident when analysis is undertaken of increments as a function of landlord hardship application. This served to increase the mean apartment results in sample structures with no welfare tenantry by 38¢ a month, while for those buildings with few welfare tenants (less than 10 percent), it was 77¢. However, in the structures with more welfare tenantry, the figure drops off very sharply. It is only 6¢ for the 10-20

Exhibit 12, Welfare.

(See opposite ☞)

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Exhibit 12 - Welfare

LEASE INCREASE PER APARTMENT PER MONTH BY DEGREE OF WELFARE TENANTRY
(WEIGHTED NUMBER OF STRUCTURES) NEW YORK CITY, 1967
(NUMBER OF STRUCTURES IS IN HUNDREDS)

Degree of Welfare Tenantry	All Structures	LEASE INCREASE PER APARTMENT PER MONTH — PERCENTILES						Interquartile Range (25%-75%)	Mean
		10	20	30	40	50	60	70	80	90		
Total	529											
None	259	$ .00	$ .00	$ .42	$2.25	$2.79	$3.38	$4.33	$5.50	$7.14	$ .00 - $5.00	$3.25
A Few (Less than 10%)	44	.00	.83	2.28	2.70	3.29	3.73	4.30	5.00	6.51	.84 - 4.44	3.25
10 - 20%	40	.00	1.59	2.61	2.81	4.00	4.39	5.53	7.16	7.68	2.39 - 5.79	4.12
20 Plus to 50%	88	.85	1.50	2.92	3.59	4.50	5.83	6.00	6.75	8.18	2.00 - 6.53	4.77
Over 50%	38	.75	2.00	3.58	4.59	5.33	6.00	6.16	8.13	10.88	3.33 - 7.14	5.89
Some - No Breakdown	41	1.00	1.50	2.00	2.75	3.35	4.50	6.07	6.50	8.72	1.79 - 6.25	4.22
NA/DK	19	.00	.00	.00	.00	.00	2.66	2.69	3.20	6.16	.00 - 3.14	1.92

NOTE: NUMBERS MAY NOT ADD PRECISELY BECAUSE OF ROUNDING.

Source: New York City Office of Rent Control; Landlord Survey; Rent Controlled Structures Only.

"Welfare Housing" From The Urban Housing Dilemma.

percent welfare tenanted structures, 4¢ for the 20 to 50 percent welfare tenanted structures, while for the 36 cases with 50 percent or more welfare tenantry, there were no increments as a function of hardship in the four-year period under consideration.

The trend for additional service increments is very slight but would indicate a far greater degree of consistency of utilization of this formula and a mean value of the utilization which is inverse to the degree of occupancy by welfare recipients; i.e., *the higher the proportion of welfare tenants, the smaller the probability that the structure will have had any substantial degree of additional services.*

Generalizations become more difficult when capital improvements are considered. It should be noted, however, that the 36 cases with 50 percent or more welfare recipients occupying them have a mean dollar increment which is a negative 32¢; i.e., so many of the structures have been penalized because of failure to provide services as to cause across the board rent decreases resulting in overall decreases.

The incidence of the other formulas for increment are trivial.

Operating Results

Rents per Room as a Function of Welfare

What rents do welfare recipients pay? In Exhibit 13 some data on this intriguing point are presented. In general it is clear that welfare structures are relatively under represented at the over $23 a room per month mark. There

Exhibit 13, Welfare.

(See opposite [illegible])

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Exhibit [illegible] - Welfare

MONTHLY RENTS PER ROOM BY DEGREE OF WELFARE TENANTRY (WEIGHTED NUMBER OF STRUCTURES) NEW YORK CITY, 1967

(NUMBER OF STRUCTURES IS IN HUNDREDS)

Degree of Welfare Tenantry	All Structures	MONTHLY RENTS PER ROOM: Up to $12	$13 to $22	$23 and Over
Total	524	264	217	43
None	256	132	95	29
A Few (Less than 10%)	44	20	19	6
10 - 20%	38	11	24	3
20 Plus - 50%	88	44	42	2
Over 50%	38	22	15	1
Some - No Breakdown	41	21	19	2
NA/DK	19	14	4	1
P E R C E N T D I S T R I B U T I O N				
Total	100.0	50.3	41.4	8.3
None	100.0	51.5	37.0	11.5
A Few (Less than 10%	100.0	44.7	42.6	12.7
10 - 20%	100.0	29.6	62.8	7.6
20 Plus - 50%	100.0	50.0	48.2	1.9
Over 50%	100.0	59.1	39.3	1.6
Some - No Breakdown	100.0	50.0	44.9	5.1
NA/DK	100.0	74.9	19.0	6.1
P E R C E N T D I S T R I B U T I O N				
Total	100.0	100.0	100.0	100.0
None	48.8	49.9	43.7	67.8
A Few (Less than 10%)	8.4	7.4	8.6	12.8
10 - 20%	7.3	4.3	11.1	6.7
20 Plus - 50%	16.8	16.7	19.5	3.8
Over 50%	7.2	8.4	6.8	1.4
Some - No Breakdown	7.9	7.8	8.6	4.8
NA/DK	3.7	5.5	1.7	2.7

NOTE: NUMBERS MAY NOT ADD PRECISELY BECAUSE OF ROUNDING.

Source: New York City Office of Rent Control; Landlord Survey; Rent Controlled Structures Only.

"Welfare Housing" From The Urban Housing Dilemma.

is surprisingly little variance, however, between the several welfare occupancy categories in the up to $12 and $13 to $22 categories.

The conclusions based upon per room rents, however, are substantially altered when we analyze the same data along the lines of rents per square foot. Here the representation of welfare recipients is relatively high in the top rent level. (See Exhibit 14) Rents per apartment by degree of welfare tenancy are indicated in Exhibit 15. As is evident, there is little variation between the categories. The average maximum controlled apartment rents in structures housing welfare tenants are quite comparable to the apartment rents in non-welfare structures.

Welfare rents within the categories shown, of payments per apartment and per room, are not strikingly distinct. In terms of value received, however, there is evidence that this is not the case. The age and maintenance rating of structures indicate less value per dollar spent than is the case in non-welfare tenanted structures.

Welfare and Profitability

How profitable is the operation of buildings with welfare tenantry? In general, *it is clear that in highly welfare tenanted structures, the level of contribution to debt, depreciation and profit is relatively low.* The mean contribution to debt, depreciation and profit of buildings with no welfare tenantry, is 21.3 percent. For those buildings with a few

Exhibit 14, Welfare.

(See opposite ☞)

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ETHNICITY OF OWNER BY DEGREE OF WELFARE TENANTRY (WEIGHTED NUMBER OF STRUCTURES) NEW YORK CITY, 1968

(NUMBER OF STRUCTURES IS IN HUNDREDS)

Degree of Welfare Tenantry	All Structures	ETHNICITY OF OWNER: White Non-Spanish	Spanish Speaking	Negro	No Answer Do Not Know
Total	529	435	24	56	14
None	259	219	6	28	5
A Few (Less than 10%)	44	39	2	4	*
10 - 20%	40	39	0	0	1
20 Plus - 50%	88	62	8	15	3
Over 50%	38	28	8	2	0
Some - No Breakdown	41	34	0	5	3
NA/DK	19	15	0	3	2
PERCENT DISTRIBUTION					
Total	100.0	100.0	100.0	100.0	100.0
None	48.9	50.3	25.2	50.3	40.1
A Few (Less than 10%)	8.3	8.9	6.7	6.3	2.4
10 - 20%	7.5	9.0	0.0	0.0	4.4
20 Plus - 50%	16.6	14.2	34.1	27.0	21.0
Over 50%	7.1	6.4	34.1	3.1	0.0
Some - No Breakdown	7.8	7.7	0.0	8.6	20.5
NA/DK	3.7	3.5	0.0	4.7	11.5

*LESS THAN 50

NOTE: NUMBERS MAY NOT ADD PRECISELY BECAUSE OF ROUNDING.

Source: Landlord Survey; Rent Controlled Structures Only.

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MONTHLY RENTS PER THOUSAND SQUARE FEET BY DEGREE OF WELFARE TENANTRY (WEIGHTED NUMBER OF STRUCTURES) NEW YORK CITY, 1968

(NUMBER OF STRUCTURES IS IN HUNDREDS)

Exhibit 14 - Welfare

Degree of Welfare Tenanted Apartments	All Structures	MONTHLY RENTS PER 1000 SQUARE FEET		
		Up to $69	$70 to $95	$96 & Over
Total	391	173	133	75
None	181	87	61	33
A Few (Less than 10%)	36	18	11	8
10 - 20%	29	8	13	8
20 Plus - 50%	60	26	23	12
Over 50%	29	13	12	4
Some - No Breakdown	32	12	12	9
NA/DK	13	10	2	1
P E R C E N T D I S T R I B U T I O N				
Total	100.0	100.0	100.0	100.0
None	47.6	50.6	45.8	43.7
A Few (Less than 10%)	9.5	10.1	8.0	10.7
10 - 20%	7.6	4.5	10.1	10.5
20 Plus - 50%	15.8	14.7	17.1	15.8
Over 50%	7.6	7.5	8.7	5.8
Some - No Breakdown	8.5	7.0	8.6	11.7
NA/DK	3.4	5.5	1.6	1.7
P E R C E N T D I S T R I B U T I O N				
Total	100.0	45.4	35.0	19.6
None	100.0	48.3	33.7	18.0
A Few (Less than 10%)	100.0	48.4	29.5	22.1
10 - 20%	100.0	26.8	46.2	27.0
20 Plus - 50%	100.0	42.4	38.0	19.6
Over 50%	100.0	44.9	40.1	15.0
Some - No Breakdown	100.0	37.4	35.7	27.0
NA/DK	100.0	73.8	16.5	9.7

NOTE: NUMBERS MAY NOT ADD PRECISELY BECAUSE OF ROUNDING.

Source: Real Property Assessment Department, New York City; Landlord Survey; Rent Controlled Structures Only.

(i.e., less than 10 percent of welfare recipients) the figure is 25.8 percent. The high contribution figure is the 29.3 percent achieved when the proportion of welfare moves up to 10 to 20 percent. But when welfare recipients make up to 20 to 50 percent of the apartments, the contribution is only 19.7 percent. *Most marked is the distribution of the buildings which have more than 50 percent welfare—over 30 percent are in the red and the mean figure is less than five percent.* (See Exhibit 16.)

This poor performance, particularly in the case of the buildings with 50 percent or more welfare tenantry, is duplicated when cash flow is analyzed as the dependent variable. By that criterion, however, the performance of the 20 to 50 percent category is inferior to the lesser welfare groups. (See Exhibit 17.) This latter pattern is evident in the exhibit on net taxable income. (See Exhibit 18.)

More insight into the area is secured by looking into the returns on welfare structures as a function of building sets.[4] If we take the Old Law 5- to 19-unit category, only

[4] In this procedure the results of the sample structures were divided into three yield categories. The top and bottom categories each have 30 percent of the sample. The size of the samples in this analysis is obviously too small for definitive analysis. The findings, therefore, are to be viewed as suggestive rather than definitive statements.

Exhibit 16, Welfare.

(See opposite ☞)

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Exhibit 16 - Welfare

CONTRIBUTION TO DEBT, DEPRECIATION AND PROFIT AS A PERCENTAGE OF NET RENT RECEIVED
BY WELFARE TENANTRY (WEIGHTED NUMBER OF STRUCTURES) NEW YORK CITY, 1967
(NUMBER OF STRUCTURES IS IN HUNDREDS)

CONTRIBUTION TO DEBT, DEPRECIATION AND PROFIT AS A PERCENTAGE OF NET RENT RECEIVED

Welfare Tenantry	All Structures	PERCENTILES					Interquartile Range (25%-75%)	Mean
		10	20	30	40	50	60	70	80	90		
Total	533											
None	257	- 9%	12%	21%	27%	30%	34%	37%	41%	48%	17% to 40%	21.3%
A Few (Less than 10%)	47	- 5%	11	23	26	31	33	39	41	47	14 to 41	25.8
10 - 20%	41	6	22	26	29	31	36	37	41	47	23 to 40	29.3
20 - 50%	90	-16	10	20	23	27	30	32	37	42	13 to 35	19.7
Over 50%	39	-27	-10	- 2	5	7	14	19	27	37	- 3 to 20	4.3
Some - No Breakdown	41	2	7	15	16	22	26	30	34	38	12 to 32	20.9
TOTAL	18	- 1	4	15	25	31	35	51	54	55	4 to 54	29.5

NOTE: NUMBERS MAY NOT ADD PRECISELY BECAUSE OF ROUNDING.

Source: Landlord Survey: Operational Analysis; Rent Controlled Structures Only.

Exhibit 17, Welfare.

(See opposite ☞)

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Exhibit 17 - Welfare

NET CASH FLOW AS A PERCENTAGE OF NET RENT RECEIVED BY WELFARE TENANTRY (WEIGHTED NUMBER OF STRUCTURES) NEW YORK CITY, 1967
(NUMBER OF STRUCTURES IS IN HUNDREDS)

		NET CASH FLOW AS A PERCENTAGE OF NET RENT RECEIVED										
		PERCENTILES									Interquartile Range	
Welfare Tenantry	All Structures	10	20	30	40	50	60	70	80	90	(25%-75%)	Mean
Total	533											
None	257	-45%	-12%	1%	7%	11%	17%	24%	31%	37%	- 6% to 28%	- 0.2
A Few (Less than 10%)	47	-22	- 5	- 2	1	9	16	20	27	31	- 4 to 24	8.6
10 - 20%	41	-19	- 6	6	10	13	22	25	29	36	5 to 26	12.2
20 - 50%	90	-27	-18	- 3	4	9	16	22	26	31	-14 to 24	- 0.9
Over 50%	39	-120	-33	-22	-11	- 2	3	8	10	29	-25 to 10	-19.0
Some - No Breakdown	41	-21	- 5	2	6	12	16	18	26	36	- 5 to 20	9.3
NA/DK	18	-14	- 1	4	4	11	19	32	51	54	4 to 51	19.9

NOTE: NUMBERS MAY NOT ADD PRECISELY BECAUSE OF ROUNDING.

Source: Landlord Survey: Operating Analysis; Rent Controlled Structures Only.

Exhibit 18, Welfare.

(See opposite ☞)

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Exhibit 18 - Welfare

NET TAXABLE INCOME AS A PERCENTAGE OF NET RENT RECEIVED BY WELFARE TENANTRY
(WEIGHTED NUMBER OF STRUCTURES) NEW YORK CITY, 1967
(NUMBER OF STRUCTURES IS IN HUNDREDS)

		NET TAXABLE INCOME AS A PERCENTAGE OF NET RENT RECEIVED										
		PERCENTILES									Interquartile Range	
Welfare Tenantry	All Structures	10	20	30	40	50	60	70	80	90	(25%-75%)	Mean
Total	533											
None	257	-38%	-12%	- 3%	3%	8%	15%	21%	28%	34%	- 9% to 23%	- 1.9
A Few (Less than 10%)	47	-18	-10	- 5	1	3	8	13	16	25	- 6 to 14	2.5
10 - 20%	41	-17	- 7	- 1	4	9	15	20	23	27	- 2 to 22	7.5
21 - 50%	90	-39	-14	- 2	4	7	11	16	20	28	- 7 to 17	- 1.9
Over 50%	39	-41	-27	-20	-16	-12	- 2	2	11	17	-27 to 9	-14.8
Some - No Breakdown	41	-17	- 7	- 3	- 1	2	5	10	16	22	- 6 to 14	1.8
NA/DK	18	-18	-13	- 6	- 1	1	13	32	47	51	- 6 to 47	12.5

NOTE: NUMBERS MAY NOT ADD PRECISELY BECAUSE OF ROUNDING.

Source: Landlord Survey: Operational Analysis; Rent Controlled Structures Only.

two of the 19 buildings with 20 percent and more welfare tenants are in the top category with seven in the poorest level, as measured by contribution to debt, depreciation and profit. The equivalent figures are three out of 14 for the Old Law 20-unit and over structures with five in the poorest category.

In the New Law facilities, 18 buildings in the 5- and 19-unit sets have 20 percent or more welfare occupancy; three are in the best category and nine are in the poorest. In the intermediate size New Laws, 31 structures have 20 percent or more welfare tenants; nine of these structures are in the best category, 11 are in the poorest.

In the 50-unit and over size category of New Law structures, there are 11 buildings that have 20 percent or more welfare tenantry, only three of which are in the top category, and three are in the bottom category of performance. The number of welfare tenanted buildings in the Post 1929 structure sample using the same cutoff as above is too small to allow generalizations. In the three- and four-unit parcels, however, there are 14 structures with 20 percent or more welfare tenants; of these, four are top performers and three are bottom performers.

Analysis of cash flow would indicate a somewhat similar pattern, with some minor exceptions in large Old Law structures and in the intermediate New Laws, where the proportion in the top performance category is higher than in the low performance group. This again is a tribute, unfortunately, not to the amount of funds available as much as it is the lack of financing availability typical of such structures. The data on net taxable income would bear out these findings.

The significance of this finding is substantial. To the degree that welfare tenants generally are poorly housed, there is some question whether disregarding the debt, de-

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-453

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants,

against

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

JURISDICTIONAL STATEMENT FILED OCTOBER 18, 1974
PROBABLE JURISDICTION NOTED DECEMBER 9, 1974

No. 74-5054

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR, CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Petitioners,

against

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, JAMES M. SHUART, individually and in his capacity as Commissioner of the Nassau County Department of Social Services, BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, and LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 2, 1974
CERTIORARI GRANTED DECEMBER 9, 1974

INDEX TO APPENDIX

VOLUME I

PAGE

Relevant Docket Entries in *Hurley* v. *Van Lare* 1

Relevant Docket Entries in *Taylor* v. *Lavine* 7

PROCEEDINGS BEFORE THE SINGLE DISTRICT JUDGE IN HURLEY v. VAN LARE, 72 CIV. 3423, S.D.N.Y.

Amended Complaint 15

Notice of Motion for an Order Determining Class Action and Summary Judgment on Behalf of Rose Hurley 29

Affidavit of Rose Hurley in Support of Motion 32

Decision After Fair Hearing, Exhibit "A" to Hurley Affidavit 36

Statement Pursuant to General Rule 9-G of the Rules of the Southern District of New York in Support of Motion for Summary Judgment 38

Notice of Motion to Intervene, for Preliminary Injunction and Class Action Determination on Behalf of Phyllis D'Alessio 41

Affidavit of Phyllis D'Alessio in Support of Motion 43

Correspondence Regarding Matrimonial Action, Exhibits "A", "B", "C" and "D" to D'Alessio Affidavit 48

Notice of Intent to Change Public Assistance Status, Exhibit "E" to D'Alessio Affidavit 53

PAGE

Memorandum from Rachel Goldfinger to Phyllis D'Alessio, Exhibit "F" to D'Alessio Affidavit 55

Notice of Motion to Intervene and for Preliminary Injunction on Behalf of Loretta Clark 56

Affidavit of Loretta Clark in Support of Motion 58

Notice of Intent to Reduce Public Assistance, Exhibit "A" to Clark Affidavit 61

Decision After Fair Hearing, Exhibit "C" to Clark Affidavit 63

Notice of Motion to Dismiss Amended Complaint or for Summary Judgment on Behalf of State Defendants 66

Defendants' Statement Pursuant to General Rule 9-G of the Rules of the Southern District of New York and in Opposition to Plaintiffs' 9-G Statement 67

Answer of County Defendant 68

Regulatory History of 18 NYCRR §§ 352.30(d) and 352.31(a)(3)(iv) Submitted in Response to Notice to Produce Directed to State Defendants 71

Opinion of District Judge Arnold Bauman 74

Judgment and Order 95

Amended Judgment and Order 98

Plaintiffs' Notice of Appeal to the Court of Appeals for the Second Circuit 101

PAGE

State Defendants' Notice of Appeal to the Court of Appeals for the Second Circuit 102

County Defendants' Notice of Appeal to the Court of Appeals for the Second Circuit 103

PROCEEDINGS BEFORE THE SINGLE DISTRICT JUDGE IN TAYLOR v. LAVINE, 73 Civ. 699, E.D.N.Y.

Complaint 107

Decision After the Fair Hearing, Exhibit "A" to Complaint 120

Answer of State Defendant 122

Decision After Fair Hearing, Exhibit "A" to Answer of State Defendant 126

Answer of County Defendant 129

Notice of Motion for Summary Judgment on Behalf of Annie Taylor and Charlotte Otey 133

Motion for Summary Judgment 134

Affidavit of Theodore Hochstadt in Support of Motion 135

Letter From Justin B. Stone to Theodore Hochstadt, Exhibit "A" to Hochstadt Affidavit 138

Notice of Cross-Motion to Dismiss Complaint and for Summary Judgment on Behalf of State Defendants 139

Memorandum and Order of District Judge Jack B. Weinstein 140

PAGE

Judgment and Order 144

Amended Judgment and Order 146

State Defendant's Notice of Appeal to Court of Appeals for the Second Circuit 148

PROCEEDINGS BEFORE THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN THE CONSOLIDATED APPEALS OF TAYLOR v. LAVINE, DOC. No. 73—2731, AND HURLEY v. VAN LARE, DOC. No. 73—2671.

Letter from David S. Kellogg to Borge Varmer Submitted by State Appellants 153

Letter From Elmer W. Smith to David S. Kellogg Submitted by State Appellants 155

Opinions of the Court of Appeals for the Second Circuit 157

Order Denying Petition for Rehearing 185

PROCEEDINGS BEFORE THE THREE-JUDGE COURT FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK IN HURLEY v. VAN LARE, 73 CIV. 3423, AND TAYLOR v. LAVINE, 73 CIV. 699, ON REMAND FROM THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

Additional Regulatory History of 18 NYCRR §§ 352.30(d), 352.31(a)(3)(iv) and Related Regulations Submitted in Response to Notice to Produce Directed to State Defendants 189

Interrogatories to Defendant Lavine 200

PAGE

Defendant Lavine's Answers to the Interrogatories .. 203

Order to Show Cause for Order Granting Intervention on Behalf of Francesca Aloise 205

Affidavit of Francesca Aloise in Support of Order to Show Cause 206

Notice of Intent to Reduce Public Assistance, Exhibit "A" to Complaint of Applicant for Intervention 208

Decision After Fair Hearing, Exhibit "B" to Complaint of Applicant for Intervention 211

Answer of State Defendants in *Hurley* v. *Van Lare* .. 215

Excerpts From Case Record of Rose Hurley, Exhibit "A" to State Defendants' Answer 221

Partial Stipulation of Facts in *Taylor* v. *Lavine* 225

Supplemental Affidavit of Rose Hurley in Support of Motion for Class Action and Summary Judgment 231

Second Supplemental Affidavit of Rose Hurley in Support of Motion 233

Supplemental Affidavit of Phyllis D'Alessio in Support of Motion 235

Supplemental Affidavit of Loretta Clark in Support of Motion 237

Affidavit of Susan E. Smith in Support of Motion ... 240

Table, Exhibit "A" to Smith Affidavit 243

PAGE

Detailed Characteristics, New York 1970 Census of Population, Exhibit "B" to Smith Affidavit 245

Affidavit of Garry W. Bickel, in Support of Motion .. 246

Table, Exhibit "A", to Bickel Affidavit 249

Table, Exhibit "B", to Bickel Affidavit 251

Metropolitan Housing Characteristics—New York, N. Y., 1970 Census, Exhibit "C" to Bickel Affidavit 253

Affidavit of John T. Hand in Support of Motion 254

Letter From John T. Hand to Applicants to Legal Aid Divorce Unit, Exhibit "A" to Hand Affidavit 256

Affidavit of Linda Harmon in Support of the Constitutionality of 18 NYCRR § 352.30(d) 257

Affidavit of Marvin Rachlin in Support of the Constitutionality of 18 NYCRR § 352.30(d) 261

Transcript of Hearing on June 26, 1974 (Excerpts).. 267

General Social and Economic Characteristics—New York, 1970 Census, Plaintiffs' Exhibit "A" 363

Detailed Housing Characteristics—New York, 1970 Census, Plaintiffs' Exhibit "B" 365

"Conclusions" From *Survey Report on Rental Housing*—New York, 1969, Plaintiffs' Exhibit "C" .. 367

"Welfare Housing" From *The Urban Housing Dilemma,* New York City, Plaintiffs' Exhibit "D".. 368

VOLUME II

PAGE

Excerpts From *Recent Housing Trends in Westchester County*—Westchester County, 1974, Plaintiffs' Exhibit "E" 410

Excerpts From Report of Housing and Rent Study Group, Temporary State Commission on Living Costs and the Economy, New York, Plaintiffs' Exhibit "F" 415

Excerpts From Residential Analysis, Westchester County, Interim Report 3—*Growth of Demand and Supply, 1970-1990,* Plaintiffs' Exhibit "G".. 420

Excerpts From Residential Analysis, Westchester County, Interim Report 5—Housing Requirements: Sub-market Housing Groups, Plaintiffs' Exhibit "H" 448

Excerpts From Residential Analysis, Westchester County, Interim Report 7—*Welfare: Households and Housing,* Plaintiffs' Exhibit "I" 470

Notice of Intent to Change Public Assistance Status, Plaintiffs' Exhibit "J" 488

Memorandum From Rachel Goldfinger to Phyllis D'Alessio, Plaintiffs' Exhibit "K" 490

Westchester County Maximum Shelter Allowance Schedule, Plaintiffs' Exhibit "L" 491

Nassau County Maximum Shelter Allowance Schedule, Plaintiffs' Exhibit "M" 495

Resume of Dr. Herbert J. Gans, Plaintiffs' Exhibit "O" 496

PAGE

Shelter Allowance Schedules, Defendants' Exhibit "B" 522

Excerpts From *Simplified Methods for Determining Needs,* HEW, 1964, Defendants' Exhibit "C" .. 604

Excerpts From *Shelter Costs and Selected Shelter Characteristics of New York State Public Assistance Recipients,* 1971 N.Y.D.S.S. Shelter Cost Survey, Defendants' Exhibit "D" 614

Letter From David S. Kellogg to Borge Varmer and Letter From Elmer W. Smith to David S. Kellogg, Defendants' Exhibit "E" 620

Notice of Motion to Strike on Behalf of Rose Hurley 624

Affidavit of Martin A. Schwartz in support of Motion 625

Affidavit of Judith A. Gordon in Opposition to Motion to Strike 628

Order Granting Motion to Strike 632

Amended Answer of State Defendants in *Hurley* v. *Van Lare* 634

Opinions of the Three-Judge District Court 639

Judgment and Order 661

State Defendants' Notice of Appeal to the Supreme Court of the United States 664

preciation and profit elements, there is enough flow of funds to substantially alter their buildings.

In sum, the basic rent levels paid by welfare recipients buy relatively little in the way of housing amenity. Despite a lack of landlord input, the Rent Control Laws serve to increase welfare rents through the turnover provisions more rapidly than is the case for non-welfare tenanted buildings.

The lack of reinvestment by landlords in improvements is in part a tribute to a captive market and prejudice, but the operating profits of the heavily welfare tenanted buildings themselves are also poor.

Excerpts From *Recent Housing Trends in Westchester County*—Westchester County, 1974, Plantiffs' Exhibit "E".

As Table V indicates, the increase in median income during the sixties barely kept pace with the increase in median rents and median home value during the decade. Housing costs increased twice as fast as prices in general.

TABLE V

RELATIVE INCREASES IN HOUSING COST, GENERAL PRICES & INCOME

1950, 1960, 1970

WESTCHESTER COUNTY, NEW YORK

	1950	1960	% Increase 1950-60	1970	% Increase 60-70
MEDIAN INCOME OF FAMILIES & UNRELATED INDIVIDUALS*	$ 3,699	$ 6,823	84.5	$11,349	66.3
MEDIAN MONTHLY RENT	$ 48	$ 78	62.0	$ 129	65.4
MEDIAN HOME VALUE	$17,390	$24,200	39.3	$40,500	67.4
CONSUMER PRICE INDEX (N.Y., N.E.-N.J.) (1967—100)	71.2	87.3	21.6	119.0	36.3

* Incomes shown are from 1949, 1959 and 1969 as revealed by the 1950, 1960 and 1970 censuses.

Westchester renters spent a median of 19.5% of their incomes on rent in 1970, which despite increased incomes, was slightly above the 1960 renter expenditure in Westchester. Across all income ranges there were 45,107 households spending more than 25%* of their incomes on rent.

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* Twenty-five percent of gross income represents the maximum amount economists and housing specialists recommend a family pay for shelter.

One-third of all renters spent more than 25% of their incomes attempting to secure adequate shelter in today's housing market.

VACANCY TRENDS

The severe tightness of the Westchester housing market, evidenced by the 16% decrease in the number of vacant units, down almost 1,500 since 1960, is a major cause of rapidly rising rents and home prices. The vacancy rates in 1970 were 2.3% for rental units and 0.5% for owner occupied units.

For units renting for $100 to $150 per month or selling for less than $35,000, the vacancy rates are even lower. Studied by size and by units in the structure, the greatest shortage appears to be in rental units having 6 or 7 rooms.

TABLE VI

TENURE BY STRUCTURE TYPE*

WESTCHESTER COUNTY, NEW YORK

1960-1970

	1960	1970	*Absolute* Change	*Percent* Change
SINGLE-FAMILY OWNER	102,196	118,486	16,290	15.9
MULTI-FAMILY OWNER	21,652	27,422	5,770	26.6
SINGLE-FAMILY RENTER	13,530	9,612	–3,918	–29.0
MULTI-FAMILY RENTER	103,903	127,109	23,206	22.3
VACANT	9,211	7,748	–1,463	–15.9
TOTAL	250,492	290,377	39,885	15.9

---

* Excludes seasonal dwelling units. In 1960 there were 4,274 seasonal units in the county. By 1970 there were 1,114 seasonal units, a drop largely attributable to conversion of seasonal to year-round units.

By location, the southern tier cities and communities along the Sound have the lowest vacancy rates. In general, vacancy rates are lowest for cities, villages, and towns in that order, and lower for owner-occupied units than for rental units. (See Table VIII, P. 11)

Household Submarkets

Through a number of processes, both economic and social, certain citizens are concentrated in limited areas of the county. Relatively concentrated groups are the first and second generation Italians, the Spanish language population, and persons below the poverty level. Blacks are twice as concentrated as any other large ethnic, social or economic group in Westchester.

Compared to white residents, black citizens have been found three times more often living in overcrowded housing and three times more often living in dwelling units lacking some or all plumbing facilities.

Moreover, because their incomes are lower, they spend a greater proportion of their income on rent than their white counterparts. Overall, blacks spent 27.5% of family income on rent compared to 19.1% spent by whites.

TABLE VII

Characteristics of Housing Occupied by White and Black Households

		Total Occupied Housing Units	*Units Occupied By Whites*	*Units Occupied By Blacks*
Occupied Units		282,629	257,565	25,064
Lacking Plumbing	No.	6,444	4,984	1,460
	%	2.3	1.9	5.8
Overcrowded	No.	16,402	12,635	3,767
	%	5.8	4.9	15.0
% of Income Spent on Rent*		20.0	19.1	27.5
Median Rent		$129	**	$107

Source: 1970 Census

* Calculated by dividing median rent by median income.
** Figure not given by Census. Estimated at $132-133.

Market Processes of the Existing Housing Supply

The existing stock of housing is not immutable. To some extent it does adapt to changing demands via the processes of conversion and demolition. In fact, during the periods of relatively low levels of new construction, which certain Westchester communities experienced during the 1960's and early 1970's, alteration of the existing stock became an important method of accommodating growth.

Excerpts From Recent Housing Trends in Westchester County—Westchester County, 1974.

Conversion of single family houses into structures with two or more units appears to have provided at least one-fourth of the total increase in the housing stock of the county between 1960 and 1970. While close to 20,000 single family units were built during the decade, the net increase in the single family housing stock was only a fraction over 7,000. This disparity is explained largely by conversion of older single family units to provide for two or more dwellings in the structure. As further evidence of the conversion process, the increase in the number of two family units in the county substantially

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Excerpts From Report of Housing and Rent Study Group, Temporary State Commission on Living Costs and the Economy, New York, Plaintiffs' Exhibit "F".

TABLE IV

(See opposite ☞)

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TABLE IV

INCOME OF FAMILIES IN RENTER OCCUPIED UNITS, 1970

New York Metropolitan Area

Gross Rent as percentage of Income	total		Under $5,000		$5,000 -6,999		$7,000 -9,999		$10,000 -14,999		$15,000 or more	
	#	%	#	%	#	%	#	%	#	%	#	%
Totals	2,544,344	100	925,269	100	345,650	100	452,591	100	458,198	100	362,636	100
Less than 15%	765,6[illegible]	31.33	8,384	1.02	44,399	12.85	161,152	35.61	262,760	57.3[illegible]	[illegible],981	[illegible].69
15 - 19%	407,226	16.66	30,913	3.75	94,638	27.38	126,322	27.91	109,632	23.9[illegible]	45,7[illegible]	[illegible].61
20 - 24%	278,004	11.37	58,781	7.12	79,051	22.87	77,425	17.11	48,314	10.5[illegible]	14,4[illegible]	1.98
25 - 34%	309,652	12.67	139,598	16.91	77,849	22.52	61,009	13.48	23,942	5.23	7,254	2.00
35% or more	572,279	23.41	503,329	60.99	42,859	12.40	18,702	4.13	6,010	1.31	1,379	.38
Not computed	211,507	4.56	184,264	10.21	6,854	1.98	7,981	1.76	7,540	1.64	4,868	1.34

On local home rule for control of rents:

"Such local home rule is a sound approach that should be pursued. This is an approach that I have pushed since I became a Senator, as evidenced by my legislative record. In 1969, my bill (S-55007A) to provide the City of Yonkers with the tools to set rent control regulations by City Council action was passed by the Legislature but vetoed by the Governor. In 1970, the same fate befell my bill (C-6439) to mandate rent control in uncontrolled apartments."

"While some type of home rule must be adopted, at the same time the basic question—who is to underwrite the cost of administering such rent control programs?—must be answered."

On housing courts:

"I was pleased to have co-sponsored the legislation creating the New York City Housing Court, and it is my hope that this works out well so that it can be considered as a model for statewide legislation."

"The subject of rent control is a complex item, firmly tied into the economy of our State, and I feel that such Hearings by your Commission will help in solving the problems we face in this area."

Mr. Morton Zucker:

On Westchester "Fair Rent Agreements:"

"Generally speaking this pattern was a 15% increase for 2-year leases and 20% increase for 3-year leases plus escalation for tax increases. The Phase II regulations then allowed a 5% increase on top of the renting pattern of May 15, 1971 to August 15, 1971 plus a 2½% annual increase for each year after January 1, 1972. The result was that the tenants in the five municipalities were being faced with increases running far in excess of the permitted limited inflationary increases contemplated by the Phase II rules. The five municipalities then banded together to petition the price commission for relief. At the hearings conducted by the United States Rent Advisory Board in April of 1972, relief was granted essentially for two reasons: 1) The rent pattern that had been established by the Fair Rent Agreements were recognized as not having been entered into as arms-length transactions; and 2) The Rent Advisory Board recognized that the vacancy rates in the five municipalities as evidenced by the United States Census of 1970 published in September of 1971, showed that in each of the communities the vacancy rate and rental housing was substantially below the standard used in the State of New York to establish an emergency housing condition. The state standard is 5%, the vacancy rate for White Plains was 2.2%, for Yonkers 1.9%, for New Rochelle 1.3%, for Mount Vernon 1.7%, and for Eastchester 1.1%."

"The remedy was an 8% limitation on an increase which the tenant could exercise by opting for a one-

year lease renewal. Thereafter the tenant would be subject to an annual increment of only 2½% in addition to tax escalations."

"On January 11, 1973, the President by Executive Order, terminated rent controls upon the adoption of the Phase III Price Control Regulations."

"In the City of White Plains, the landlords' association has been restricting itself to the general formula of an increase on rent renewals to be a 15% increase for two-year renewals and 20% for three-year renewals which is a formula that had been applicable to the White Plains *Fair Rent Agreement* which expired in July of 1973. Based on complaints received in the Law Department from tenants, it is believed that this is the the established pattern in the large apartment houses (post 1947 construction). The tenant complaints addressed to these increases is that their incomes have not increased sufficiently to enable them to afford high increases."

Proposal:

"It is our recommendation that the most practical method of regulating rents for post 1947 constructed housing is for New York State to adopt the federal regulations as they existed on January 11, 1973, rolling back rents to that date and allowing for the controlled increases from that date as provided in those regulations, commonly referred to as the 'Phase II Rent Regulations.'"

"Secondly, decontrol of those rents could be provided for in a systematic way by having a special housing census conducted in a manner provided by

the State Emergency Housing Rent Laws to mandate decontrol whenever the vacancy rate in a particular community drops below a fixed standard such as 5% vacancy rate."

Hon. Alfred DelBello:

On rental housing in Yonkers:

"Being involved in the 4th largest City of the State, as you well know, has varying kinds of responsibilities and problems, but I can say quite honestly that no single problem has occupied more of my time during the past four years than the housing and rental situation."

Excerpts from Residential Analysis, Westchester County, Interim Report 3—*Growth of Demand and Supply, 1970-1990,* Plaintiffs' Exhibit "G".

SUMMARY

Over the next twenty years, it is expected that the need for housing units in Westchester County will exceed by nearly 100,000 the number of units available to fill that need. This lack of equality between demand (number of households seeking units) and supply (housing units expected to be built) results in the "gap" or "deficit" of 100,000 units. Such a "gap" is only a way of looking at the future, not a firm statement about the future. If it is a county goal to achieve a projected amount of population growth, then a land use and development policy should be prepared and effectuated to make the goal an attainable one.

The alternative (scaling down of the population projections) is not a realistic approach in terms of the past trends of county development. Westchester communities are attempting to encourage non-residential land uses to locate in their jurisdictions to offset the tax burden of the residential sector. Firms finding operations in the heart of the New York Metropolitan complex difficult may consider suburban locations. The desire for such a suburban location is tempered by space requirements at reasonable cost and a labor pool sufficiently large to meet needs for blue collar, clerical, technical and administrative workers. Unless firms can be assured of finding a supply of labor to meet their needs, they may not consider suburban areas as a location.

A policy to increase the supply of housing is necessary to assure firms that Westchester County will be capable of supplying workers. If firms do not continue to move to Westchester, localities and residents will be faced with higher taxes to support public services.

Interim Report 3—Growth of Demand and Supply, 1970-1990—Westchester County.

The examination of the demand-supply relationships for housing in this report is based on two series of projections. The first is of the number of households as derived from projections of the size of population. The second is an independent projection of the number of units the private building industry may be expected to supply based on past building trends in the county. It represents an approximation of future activity if no basic changes in construction techniques and availability of land take place.

In spite of the increasing number of persons expected to be living in the county in the next ten to twenty years, the characteristics of the population are not anticipated to change markedly. The only changes are that the average age of the population in 1980 and 1990 will be slightly younger than at present, and that the older-aged population will increase in number.

The percentage of non-whites is expected to rise somewhat by 1990; the most significant increase for non-whites will be in the under 25 age group.

As a result of a decreasing average size of household, the rate of increase in the need for housing units will be larger than the rate of population growth. In areas where multi-family units account for a significant proportion of the total housing stock (the cities and major villages), there is a tendency for the average household size to be smaller than in town areas. Trends in apartment size have been correspondingly toward smaller units; few apartments are built with more than 2 bedrooms, and local practices and policies in some areas restrict multi-family unit construction to efficiency and one bedroom units.

Since less housing units are projected to be built than population projections indicate will be needed, there will be a growing deficit in the number of units available over the next 20 years. Policies are required to enable private builders and the public sector to reduce the deficit,

especially in the north and central county. In the north county, with the provision of sewers, new areas can be opened for development; in the central and south county, where many areas are already sewered, there should be a more intensive use of land and more extensive rehabilitation and redevelopment programs. There should be a shift from predominantly single family unit construction in many parts of the county (especially in the north and in sections of the central county), to multi-unit construction.

The income of Westchester households is anticipated to increase faster than either the value or rent levels of housing. However, an increasing number (though smaller on a percentage basis) of households are projected to exceed the generally accepted standard of paying more than 2.5 times their income for single family housing or over 25 percent of their income for rent. This is due, in part, to the excess of the projected need for housing over the projected availability of housing. In addition, higher income households may and do elect to occupy lower-cost housing which would otherwise have been occupied by lower income households. Accordingly, policies must be framed which both increase the supply of lower and moderate cost housing, as well on the higher priced homes and apartments.

Section I

Introduction

Independent projections of the demand for and supply of housing rarely show equality between the number of units presumed to be needed in the future and the number of units projected for construction. The divergence between the two is meaningful only if both series of projections (demand and supply) are considered as part of a policy of development. A population projection may be carried out either

as an exercise in birth, death and migration statistics, or it may be stated as a goal with action indicated to fulfill the projection. A similar statement can be made for the number of housing units projected to be constructed in the future.

For example, if demand is projected to exceed supply in the future, elimination of the resulting gap can be achieved either by increasing the supply of housing or being content with a smaller population than was anticipated. On the other hand, an excess of future supply over demand (a much less likely situation) would mean that greater efforts to attract new residents to the area should be made.

The population projections prepared by the Westchester County Department of Planning embody the current expectations for population growth in Westchester. These projections assume a moderate rate of increase in population in terms of the amount of land in the county which could be used for residential development and previous rates of migration and natural increase. Accordingly, the Westchester County Department of Planning's population projection is viewed as an attainable goal or target.

The significance of future gains in population can be seen by examining the present status of the county's labor needs in terms of the available number of workers and the impact of these needs on the housing stock. If the County's population remains relatively stable, the need for workers (professionals, technicians, clerical and service workers) will outgrow the ability of the resident labor force to supply workers. In-commuting to Westchester from other areas could help, but, only for the higher paying occupations; clerical, sales and service workers, generally will not travel in excess of 20 or 30 minutes to work.

"The possibility of curtailment of economic development because of shortages of lower and middle income workers is far from idle speculation. Many of Westchester's major

employers are already experiencing serious shortages of secretarial and clerical personnel. Unless housing opportunities for middle income families in the County are drastically increased, the shortage will inevitably grow worse. In 1968 there were approximately 52,500 secretarial and clerical jobs in the County and 140,000 women in the labor force for a ratio of 1 to 2.7. By 1985, the number of secretarial and clerical jobs will increase by 90 percent to 100,000. However, the number of women in the labor force will have increased by a much smaller figure with the result that the ratio will fall to 1 to 2. Thus today's already serious secretarial and clerical shortage will be greatly intensified. The shortages cannot be relieved by in-commuting because of the demonstrated unwillingness of women to commute long distances to work."[1]

Failure to construct an adequate supply of new housing for an increasing population creates a "seller's market" which will have a detrimental effect on the quality of the housing stock. As the housing stock ages, the physical condition of many rental units may deteriorate. With relatively few units being added to the stock, the large demand for housing will give landlords little incentive to maintain and repair their units. The costs of single family and multifamily housing will increase rapidly under the pressure of increasing demand and inadequate supply.

If the anticipated growth of the population in the county is prevented by housing shortages, one serious effect will be increased pressure on the tax structure of individual localities. As mentioned above, the supply of workers will not be sufficient to meet the needs of firms. In turn, firms may either shift their operations out of Westchester or new firms may look elsewhere to locate. The result of these de-

[1] *Westchester's Economy,* Westchester County Department of Planning, 1970.

cisions would be a contraction of the tax base of municipal governments and school districts alike. Without the tax payments of an increasing non-residential sector, home owners (and renters, through rent paid to the landlord for taxes) will have to assume a larger proportion of the property taxes. The resistance of many localities to population growth because of its supposed fiscal burden may thus have exactly the opposite effect of what is intended.

Projections of housing units and households (population) are developed in order to gauge the supply-demand relationship in the future. In most population projections, it is implicitly assumed that demand for housing will inevitably result in its supply. This is a traditional assumption and, in many cases, made with little risk of later embarrassment. In Westchester County, at the present time, it may be made only at great peril. There are forces at work which tend to threaten the likelihood of the simple maxim that demand for housing will generate a supply of housing.

Other reports in this series indicate, in detail, some of the forces affecting the housing market and attempt to assess their impact on the supply of housing. One of these reports, Interim Report No. 2, *Factors Affecting the Cost and Supply of Housing,* deals with cost and other interrelationships which serve to drive up the final price of housing. This report is based on data from builders and developers. In general, builders have been able to construct high cost housing and find buyers or renters with little difficulty. A large pool of potential demand from high income households is being generated by the exodus of both families and jobs from New York City. The desire of new residents in the New York Metropolitan Region to avoid the problems (and perceived dangers) of the City of New York also adds to demand for housing in the suburbs. These high-income households can afford $50,000 to $80,000 homes or apartments renting for $250 and more per month.

Minimum housing costs in Westchester are now at such a high level that the lower and middle income families can "demand" but cannot obtain housing at prices they can afford. This need is not being met by the private market and is only partially satisfied by the public sector.

New housing for families with annual incomes below $10,000 cannot be provided in the county under present circumstances. New single family housing costs at least $40,000 per unit while new two bedroom apartments rent for a minimum of $250 per month. Because the private building industry, by its own admission, cannot meet the needs of lower income families, the need for action is passed along to the public sector. A number of programs and procedures have been developed, but they have not as yet come close to satisfying the demand for low cost housing.

For example, Urban Renewal and construction of public housing have had little impact on the number of units available to low income households. In most instances, new units built merely replace existing units removed from the stock. The Federal Model Cities program has not been extended to all cities in the county; Mount Vernon alone has received a planning grant for a Model Cities program. The New York State Urban Development Corporation and its subsidiary, the Westchester Development Corporation, has only recently begun to consider specific action in Westchester.[1]

The State Constitution prohibits the County, as a unit of government, from taking direct action in providing housing. Moreover, local governments generally tend to be

[1] The New York State Urban Development Corporation has signed memoranda with 5 Westchester communities as well as with the County; all of these agreements involve the provision of housing.

reluctant to grant permits for low (or even moderate cost) housing in response to their residents' fears of rising municipal and school costs and the alleged destruction of the present environment and the tax abtatement such projects require.

Therefore, when lower cost housing is discussed, questions are raised, such as: "Is there any reason why Westchester County should provide a mechanism by which lower cost housing could be constructed?" and "Why can't only those families who can afford to live in Westchester County live here and those who can't, live somewhere else?" Variations are prevalent but an attempt is usually made to state the point with circumspection. As indicated earlier, the most meaningful response to such questions is that the need for workers in local firms is rapidly outgrowing the available supply. Accordingly, the supply of workers must be considered if Westchester residents wish to see a continuation of the recent rapid economic growth. It would seem reasonable to expect that most of the county's work force should be able to live in adequate housing located in the county. However, the county is oriented mostly towards housing for middle and upper income groups and cannot satisfy the housing needs of clerical, service and other lower paid workers.

An examination of the demand and supply relationships (or the lack of a relationship) is the purpose of this report. On the demand side, population forecasts (prepared by the Westchester County Department of Planning) have been used to develop projections of households by income group. For the supply of housing an independent projection of housing units, by cost levels, was prepared by the consultant.

A major change in conditions affecting either the demand or supply side of the market would call for revision

of these projections. For example, if sewer lines were extended to large areas of the North County, the supply projections would have to be revised upwards. On the other hand, if a new federal subsidy program of the magnitude of the FHA home mortgage guarantee program of the late 1940's and 1950's were to go into operation, both the demand and supply projections would need revision.

The supply projections are based on the number of units and the costs of new housing built in the 1950's and 1960's. Continuation of the past trends into the future was accomplished by examining the factors which were believed to underlie the trends. The number of units projected for the future was based on the rates of change for the most typical period in the past. The impact of the recent inflationary period in home prices and rents was softened by using data prior to the onset of the period of most rapid price increases.

Income projections were derived from the population projections. Again it was necessary to discount the rapid rise in income in the last few years to keep the cost and income projections consistent. Changes in the level of income from the 1950 to 1960 period as well as later data for Westchester and other areas were used to develop projected rates of increase.

Both the income and cost projections are given in terms of the price level for each projection year. This approach combines the real increases in value of rent or income with those of prices generally (inflation). Separation of real from absolute price increases would have greatly understated the actual dollar costs of housing, or of income earned in future years.

Section III

Projection of the Supply of Housing.

(See opposite ☞)

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SECTION III

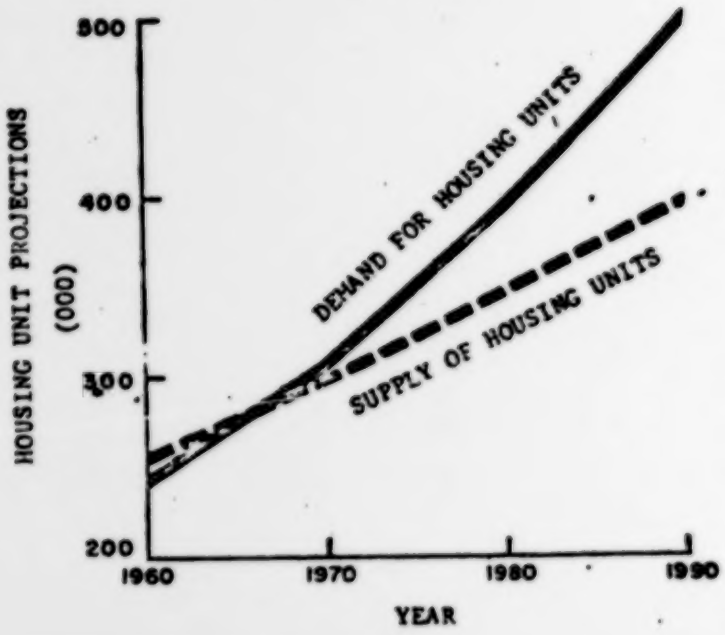
PROJECTION OF THE SUPPLY OF HOUSING

A. Projection of Housing Units:

On an overall basis, fewer housing units are projected to be built/1 than the population projections indicate will be needed (Table 9). Theoretically, there will be a "gap" of 7,700 units in 1970, rising to a "gap" of over 102,000 units by 1990/2 (Figure 5 and Table 10). Since the population projections are assumed to be the goal which should be attained, action will be necessary to make it possible for the private building industry and/or the public sector to construct the required number of units.

FIGURE 5

PROJECTED SUPPLY AND DEMAND
FOR HOUSING UNITS
WESTCHESTER COUNTY
1960 - 1990



/1 The projection of housing units is based on past building trends for each type of structure in each Planning Area in the county. They represent what the building industry in Westchester will probably produce, assuming no basic change in the conditions of supply which prevailed from 1950 to 1968.

/2 The amount of the gap is determined by subtracting the number of housing units projected to be in existence in 1990 (397,910, Table ^) from the projected number of households (500,030, Table 7) for the same year.

Table 10, Ratio of Housing Units to Household.

(See opposite ☞)

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TABLE 10

RATIO OF HOUSING UNITS TO HOUSEHOLDS /1
WESTCHESTER COUNTY, BY PLANNING AREA
1960-1990

Planning Areas:	Actual 1960	Projections 1970	1975	1980	1985	1990
Planning Area I	1.23 /2	.91	.82	.74	.72	.63
Planning Area II	1.16 /2	1.06	1.03	.99	.93	.86
Planning Area III	1.44 /2	1.07	.98	.86	.71	.58
Planning Area IV	1.05	.89	.81	.77	.73	.70
Planning Area V	1.04	.99	.95	.90	.87	.82
Planning Area VI	1.01	1.00	.97	.90	.87	.82
Planning Area VII	1.01	.99	.97	.94	.91	.87
Planning Area VIII	1.01	.97	.92	.89	.87	.85
Planning Area IX	1.02	.96	.92	.86	.82	.77
Westchester County	1.04	.97	.93	.88	.84	.80
.Shortage	+ 10,000	7,757	32,390	46,984	68,697	102,120

/1 Levels of less than 1 point towards an under-supply.
/2 These areas have a large number of seasonal units which accounts for the high initial ratio of housing units to households.

Source: U.S. Census of Population and Housing, 1960; building permit information provided by builders and estimates by consultant.

Interim Report 3—Growth of Demand and Supply, 1970-1990—Westchester County.

Specific geographic areas where public action will be needed if the population as projected is to be attained are those with the greatest divergence between the number of projected households and the number of projected housing units (Table 10). Accordingly, programs to increase housing production will be necessary in the north and parts of the central Planning Areas in the later projection years (1980, 1985, 1990). In the South County, emphasis should be placed on rehabilitation and redevelopment of areas which have relatively high density development. In the central and southern Planning Areas where there are already services available, more intensive use of land in suitable locations is consistent with the generalized development objectives as formulated by the County Planning Board. In the northern area, provision of sewers to areas not presently served, but sewerable, could "open up" large parts of the county to higher density development.

The projections of housing units envision a continued shift towards multi-family[1] units in the Central County (Planning Areas IV, V, and VI) and Southern County (Planning Areas VII, VIII and IX). Multi-family structures are projected to predominate in the southern areas; in the central Planning Areas, multi-family units as a proportion of total units will rise. (Tables 11 and 12).

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[1] Multi-family housing is considered to be any type of structure, containing two or more housing units. The projection of both single and multi-family units is based on past construction trends of each type of unit in each Planning Area in the county.

Table 11, Projected Number of Single-Family Housing Units.

(See opposite ☞)

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TABLE 11

PROJECTED NUMBER OF SINGLE-FAMILY HOUSING UNITS
WESTCHESTER COUNTY, BY PLANNING AREA
1960-1990

Planning Areas:	Actual 1960	Projections 1970	1975	1980	1985	1990
Planning Area I	15,408	19,540	21,470	23,280	25,000	26,62
Planning Area II	9,148	11,990	14,200	17,040	20,350	24,18
Planning Area III	3,504	4,830	5,750	6,850	8,130	9,58
Planning Area IV	12,335	15,380	16,860	18,420	19,900	21,46
Planning Area V	14,703	17,220	18,430	19,740	20,950	22,26
Planning Area VI	14,209	15,650	16,260	16,800	17,270	17,68
Planning Area VII	17,786	19,410	20,220	21,030	21,840	22,65
Planning Area VIII	23,240	24,720	25,450	26,190	26,900	27,66
Planning Area IX	13,741	15,590	16,520	17,440	18,370	19,29
Westchester County	124,074	144,330	155,160	166,790	178,710	191,38

Source U.S. Census of Population and Housing 1960; New York State Division of Housing and Community Renewal; and estimates by consultant.

Table 12, Projected Number of Multi-Family Housing Units.

(See opposite ☞)

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TABLE 12

PROJECTED NUMBER OF MULTI-FAMILY HOUSING UNITS
WESTCHESTER COUNTY, BY PLANNING AREA
1960-1990

Planning Areas:	Actual 1960	Projections 1970	1975	1980	1985	1990
Planning Area I	4,992	6,070	6,570	6,990	7,430	7,770
Planning Area II	1,801	2,930	3,700	4,060	4,800	5,190
Planning Area III	247	290	300	330	340	370
Planning Area IV	4,011	5,610	6,410	7,210	8,010	8,810
Planning Area V	11,097	14,130	15,990	17,160	19,020	20,190
Planning Area VI	12,162	15,780	17,980	19,390	21,590	23,000
Planning Area VII	42,981	52,880	57,830	62,780	67,730	72,680
Planning Area VIII	39,304	43,150	45,220	47,720	50,090	52,900
Planning Area IX	11,003	12,540	13,460	14,080	14,990	15,620
Westchester County	127,598	153,380	167,460	179,720	194,000	206,530

Source: U.S. Census of Population and Housing, 1960; New York State Division of Housing and Community Renewal; and estimates by consultant.

B. *The Overall Need for New Housing.*

(See opposite ☞)

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B. The Overall Need for New Housing:

The need for new housing includes demands by newly formed families, by families moving into Westchester County from other areas, and the replacement of substandard units (Table 13 and Figure 6). A minimum overall vacancy rate is assumed to be about 1 percent of the total stock of housing.

FIGURE 6

SOURCE OF DEMAND FOR NEW HOUSING UNITS
WESTCHESTER COUNTY
1960 - 1990

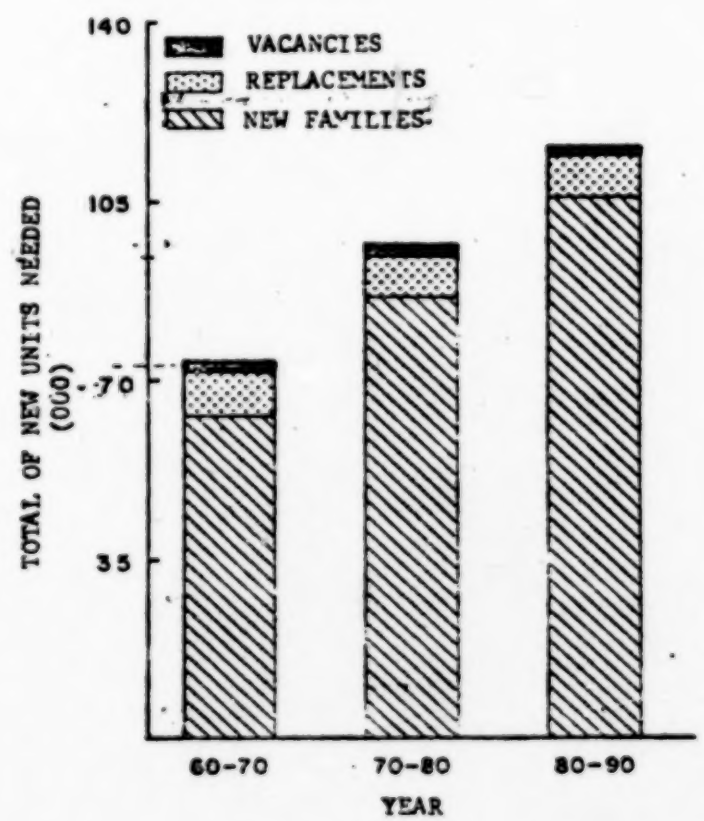

TABLE 13

SOURCE OF DEMAND FOR HOUSING UNITS

WESTCHESTER COUNTY

1970-1990

	Additional Units Needed			
Source of Demand	*1970-1974*	*1975-1979*	*1980-1984*	*1985-1990*
New Family Formation[1]	19,522	21,873	25,100	28,843
New Family Immigration[1]	22,264	24,368	22,813	29,780
Units to replace demolitions[2]	996	956	1,048	1,008
Units to replace substandard housing[3]	2,885	2,885	2,885	2,885
Vacancies[4]	249	239	262	252
Total New Units Needed	45,916	50,321	52,108	62,768

Sources:

[1] Based on population projected by Westchester County Department of Planning and projected average household size.

[2] Estimated on basis of urban renewal and highway construction relocations.

[3] Includes only those housing units substandard in 1960; any units which may become substandard are not included. U.S. Census of Housing, 1960.

[4] Assumed to be at least 1 percent of the average housing stock, for each period.

The total number of new units projected to be needed from 1970 to 1990, 211,143 (for both new families and as replacements) exceeds the projected increase in supply of 110,200 units by 100,943 units[1] (Tables 9 and 13). Most new construction has taken place in areas of the county where there is relatively little need for replacement of units. Replacement housing needs in the south and parts of the central Planning Areas are not being satisfied. In the cities where urban renewal has resulted in the demolition of units, efforts have been made to find standard condition relocation housing at cost levels which could be paid by the relocatees. Relocation remains complicated by the fact that a sufficient supply of new housing is not available[2]. To replace substandard units (not including urban renewal), additional new units will be required. Demolition (and an equal level of new construction) of all substandard units (17,310 in 1960 and an estimated 17,500 in 1970[3]) has been assumed to take place from 1970 to 1990

[1] The projected overall demand for 211,143 units from 1970 to 1990 (Table 13), less the projected overall increase of 16,550 in the number of units to be replaced during the same period (also from Table 13) is 194,563 units. The result is the same as subtracting the projected number of households in 1970 from the projected number of households in 1990, 305,467 from 500,030 (Table 7). Adding back the 16,550 units needed for replacement of existing units, gives a total need of 211,143 units. Of this total, 110,200 units are projected to be built by the private construction industry leaving a "deficit" of 100,943 units if the projected number of households is to be attained.

[2] In many cases, just providing new housing would not be satisfactory for relocation needs because the rent levels or purchase prices would be too high for relocated families to absorb. Some type of public subsidy would be necessary for most of the families (or housing units).

[3] Data from the 1968 Household Survey indicate that residents classify 5.9 percent of all units in "poor" or "bad" condition. This percentage, multiplied by 298,000, the estimated 1970 number of housing units, yields the estimate of 17,500 units.

(Table 13). If replacement is accelerated, a larger number of new units in the earlier years would be required. The replacement needs from 1970 to 1990 are understated to the extent that no account is taken of additional units which may fall into substandard condition after 1970.

D. *Additional Housing Units Needed to Meet Demands:*

The gap between the demand for housing and the projected supply of units is based on the assumptions that Westchester will attain its projected level of population and that the private construction industry will continue to construct housing at rates indicated by its past performance. These two conditions assume a responsibility by all levels of the public sector (the county, as well as individual municipalities) in providing leadership in attaining the projected population through increased construction of housing units.

Needs for additional housing units have been mentioned earlier. The breakdown of the units needed into single and multi-family and then by cost level is an indication of the extent of the problem and the type of action needed. About half the units needed (over and above the projected supply) will be single family homes (Table 18). The number of such additional units needed is anticipated to rise from 3,750 in 1970 to nearly 49,000 by 1990. Both relatively inexpensive homes (selling for less than $30,000) and expensive units (over $50,000) will be needed during the 1970 to 1990 period. Extrapolating the estimated minimum construction cost of $40,000 in 1970, $65,000 in 1980, and $100,000 in 1990 reveals that an additional 2,000 single family units below the minimum market cost level are needed in 1970. This number will rise to 11,500 in 1980 and 26,000 in 1990. However, the private construction

industry will not be able to build units below these price levels unless there is a major cost reduction in construction.

The additional need for multi-family units, in excess of the projected construction level, will be slightly greater than that for single family homes. A gap of about 4,000 rental units is estimated in 1970, 23,000 in 1980, and 53,000 in 1990 (Table 19). In 1970, units in all price ranges from less than $80 to over $300 will be needed. About 3,500 additional units in 1970 should be available to rent for less than $250 a month, about the minimum rental for new two bedroom units. In 1980, about 15,500 rental units costing less than $300 will be needed above the number projected to be built. By 1990, approximately 27,000 units which will rent for less than $400 will be needed.

Local builders, on the basis of past trends, will be able to construct housing which about 80 percent of the projected population in 1990 can afford. The additional 20 percent or 100,000 units needed by 1990 can be built only if there is some type of public action. Public sector involvement ranges from willingness on the part of some (or all) municipalities to permit higher density single family housing to the construction of more public housing units. Intermediate steps are granting of tax abatements, permits for multi-unit construction in areas where they would be consistent with the overall development of the county, or sponsorship of rent supplement and other federal housing programs. On its part, the county can encourage the use of land available and suitable multi-unit housing.[1]

* * *

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[1] See Interim Report 2, *Factors Affecting the Cost and Supply of Housing*, pages 55 through 73 for the role of the County in providing roads, water and sewage disposal.

B. *Housing Cost to Income Relationships:*

The amount of household income spent for housing is an indication of the balance between the supply and demand factors in the market. If rent to income and value to income ratios are excessive[1], over 25 percent, and more than 2.5, respectively, some households may be assumed to be living in housing that is priced above their means or are forced to allocate income to housing which should be used for other purposes. On the other hand, rent income ratios below 25 percent and value income ratios below 2.5 times income may be an indication that households have sufficient income to meet their housing needs.

In order to determine the ability of Westchester County household to spend income for housing, rent and value income ratios have been projected into the future by income group. These projections are based on the income projections discussed in the preceding section and also on the relationship between projected median income and projected median rent and value. Initial rent and value income ratios by income group, used as starting points for the projections, were developed from the 1968 Westchester County Household Survey data, and the U. S. Census of Housing for 1960.

On an overall basis, the rent-income and value-income ratios are projected to decline assuming that household

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[1] Rent-income and value-income ratios depict the relationship between the monthly rental cost of rental housing and the value (selling price) of single family housing and household income. Rent-income is calculated by dividing annual rent by income; value-income is determined by dividing value by household income.

income, rents and values continue to increase at their present rates. A decline also takes place for particular income groups as the level of income for the group rises over time. Accordingly, the "low" income group in 1960, 1970, 1980 and 1990 will have a successively lower value (or rent) to income ratio. The same situation holds, although at different income levels, for the moderate, middle and upper income groups. (Figure 8)

Figure 8, Cost of Housing to Income Relationships.

(See opposite ☞)

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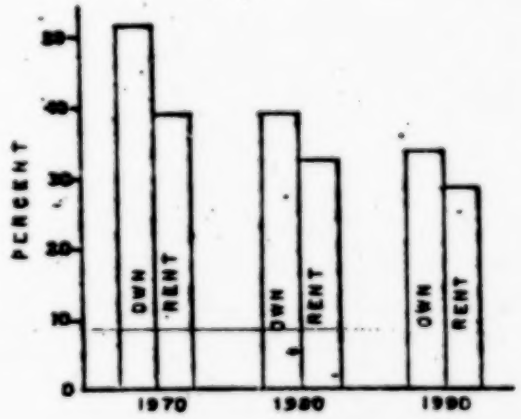
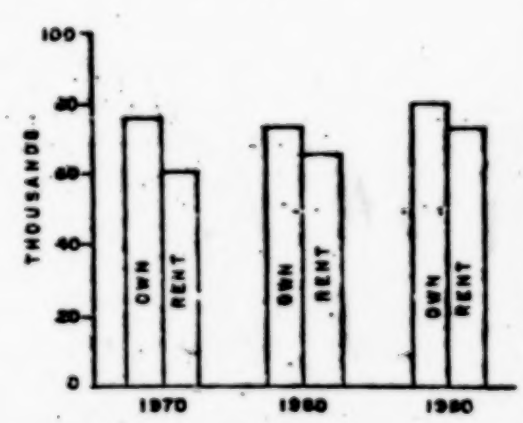
Although a decline in rent-income and value-income ratios is projected, it must be realized that large segments of both the home-owning and renting population will still be spending excessive percentages of their incomes for housing. In fact, because of the county's population growth, the absolute number of families spending more than 25 percent of their income on housing will actually increase although the proportion of such households will decline.

FIGURE 8

COST OF HOUSING TO
INCOME RELATIONSHIPS
WESTCHESTER COUNTY
1970 - 1990



Percent of households paying more than 25 percent of income for rent or owning houses valued at more than 2.5 times yearly income.



Number of households paying more than 25 percent of income for rent or owning houses valued at more than 2.5 times yearly income.

However, projected white and non-white value and rent income ratios by income group indicate that the ratios will rise over the 1970 to 1990 period for the same income group (holding the level of income constant). (Tables 24 through 27) For example, the white (or non-white) $10,000 to 14,990 income group will have a higher rent (or value) income ratio in 1990 than in 1970. Moving to successively higher income groups, the rent or value to income ratio will be less than for the preceding lower-income group.

The cost to income relationship, as discussed earlier, indicates the need for housing priced at a level which will permit owners

and renters to satisfy their housing needs without spending more than 25 percent of their income for rent or more than 2.5 times their income for housing. For renter households paying in excess of 25 percent of their income for rent, subsidy programs which have been designed to supplement rent payments may be needed. For owner households with a greater than 2.5 to 1 ratio of housing cost to income, equivalent supplementation may also be called for. However, the existence of high value-income ratios may "force" households who would prefer to own, to seek rental quarters. This potential shift of households with high value-income ratios from sale housing to rental units would serve to increase the demand for rental units further, possibly driving the monthly rental to a higher level and thus increasing the difficulty of finding rental housing.

Translating these concepts to numbers of housing units and households cannot be accomplished on a precise basis. "Nothing prevents a household which could afford to rent a $250 a month apartment from renting a $200 a month apartment. The same applies to purchasing a house. This situation always works to the disadvantage of the lower income household which may eventually be 'squeezed out' of the market. Combined with the potential increase in demand for multi-family housing from households who cannot find single family housing, the plight of the low-income households becomes very serious."

Under conditions of an inadequate supply of low cost housing, existing units may be allowed to fall into disrepair because there is no reason to maintain them. If one tenant leaves an apartment, another will move in to replace him, perhaps at a higher rent level.

An examination of rent-income, value-income ratios and the rates of increase in the number and cost levels of units in the future will indicate whether or not the situation is

improving. If there is a continuous decline in the number of housing units built, and costs continue to rise, the situation will become progressively worse. Higher income groups will begin to be affected and the private market may not be able to reverse the trend without massive public assistance. This could occur because higher income households might elect to pay lower rents and buy cheaper housing than might be expected. Occupancy of rental housing priced below 25 percent of income or single family units selling above 2.5 times income by higher income households would reduce the number of units which could be occupied by lower income households. The only mitigating factor would be injection of public funds to support lower housing costs, supplement rents or subsidize interest payments.

The need for new housing, improvement of the existing stock of housing, and policies regarding use of vacant land must be considered as an interrelated network. For this reason, detailing of the recommendation and choices of policies is postponed until the analysis of all aspects of housing is complete.

Excerpts From Residential Analysis, Westchester County, Interim Report 5—Housing Requirements: Sub-market Household Groups, Plaintiffs' Exhibit "H".

SUMMARY

Six groups of households are included in the analysis of housing problems, resident attitudes, and projected housing needs. The information on the characteristics and attitudes of the sub-group households is drawn from the household survey conducted in 1968. The six sub-groups are:

(1) low income households (less than $5,000 income in 1970 and the same percentage share of all households for 1980 and 1990);

(2) moderate income households ($5,000 to $9,999 income in 1970 and the same percentage share of all households for 1980 and 1990);

(3) middle income households ($10,000 to $19,999 income in 1970 and the same percentage share of all households for 1980 and 1990);

(4) elderly households (head of household 65 years old or over in 1970, 1980, and 1990);

(5) large households (six or more related persons living in the same housing unit in 1970, 1980, and 1990).

(6) non-white households (head or spouse of head non-white in 1970, 1980, and 1990).

The so called "sub-group" household categories are not mutually exclusive. The same household could be part of from two to four sub-groups. There is known to be considerable overlapping of the low income and elderly sub-groups and also of non-white and low income household

Interim Report 5—Housing Requirements: Sub-market Household Groups—Westchester County.

groups. The three income categories (low, moderate, and middle) are mutually exclusive in any one year, but not over time.

The following summaries or profiles of the households in each group supplements the longer discussion in the body of the report. In this summary each group is presented separately, while in the body of the report the analysis is compared for all groups. This dual approach presents two points of view: A concise "picture" or "profile" of each group and then a more lengthy treatment of the same groups, emphasizing similarities and differences among the groups.

Low Income Households

Low income households are comprised of a small number of persons (median 1.7), reflecting the median age of all heads (male or female) of 60 years. Slightly over half have a male head. About 60 percent of low income households are white. Household income was a median of $3,100 with approximately a quarter of all households receiving public assistance.

Nearly a fifth of the households lived in owned single family housing with a median value of $31,200. Those low income owner households who had a mortgage paid a median of $123 monthly. The remaining 80 percent of the households rented and paid $98 monthly for rent and utilities. The proportion of income spent for housing was higher for owner households than for renter, medians of 47.6 percent compared to 37.9 percent. The value of owned single family homes is 10 times household income. About 40 percent of all low income households had moved to their present unit within the past three years.

Roughly 15 percent of the low income households reported their unit in "poor" or "bad" condition. A larger

share, 28 percent of the households planned to move within one year. Approximately 30 percent would prefer to own if they moved, the remainder renting. Two-thirds of the low income households would prefer to move to another location in the community (town, village or city) in which they presently reside.

Housebreaking is feared by 60 percent of all low income residents. A third also are isolated from the community and their own neighborhood and families. In addition, low income households report a lack of police protection, parking spaces in the neighborhood and indoor as well as outdoor recreation facilities. Major neighborhood and social problems are reported to be petty crime, lack of care for the elderly, lack of homes for illegitimate children, care for the handicapped, lack of day care centers, juvenile delinquency, drug addiction, and discrimination in housing. In addition, more than 60 percent of the low income households feel that local government officials and agencies are not trying to solve problems of discrimination in housing and lack of day care facilities.

The number of low income households is projected to increase by 66 percent over the 1970 to 1990 period. Since low income is, by definition, relative, the share of the county's population classified as low income remains constant, but the number of such households rises as population increases. In 1990, low income households are projected to have median income of $8,400 and be able to pay $21,000 for a single family home or monthly rent of $202. Both of these levels, but especially the amount to be spent for single family homes, are below the projected prices of homes for 1990.

Moderate Income Households

These households had a median of 3 persons, and over 85 percent had a male head. All heads for moderate income households, regardless of sex, had a median age of 41 years; over three-quarters of the total where white households. Median household income was $7,900, with about 3 percent listing public assistance as a source of income.

Nearly 30 percent of the moderate income households live in single family homes; a slightly larger share, 34 percent, own their unit. The difference is made up of households owning 2 or more family houses or possibly a unit in a cooperative apartment complex. Monthly payments made by those who own and have mortgages is $155 (median level) while all owner occupied homes are valued by their occupants at $28,700. These cost levels reflect a monthly payment to income ratio of 23.5% and a value to income ratio of 3.6 times income. The two-thirds of the moderate income households who rent pay a median of $118 monthly and have a rent to income ratio of 17.9 percent. About 30 percent of the moderate income households have moved from a different house within the past three years.

A tenth of the units occupied by moderate income households were reported in "poor" or "bad" condition, while about a fifth of the households planned to move within a year. Slightly less than 60 perecnt would like to own if they moved. About half would prefer to remain in the same town, village, or city.

About 75 percent feel their home is safe from housebreakers, while some 17 percent indicated they were alienated from the community. The major service or facility which moderate income households reported was lacking was recreational facilities (both indoor and outdoors). Moreover, households reported that juvenile delinquency, drug addiction and petty crime were problems in their areas. At least 60 perecnt of the moderate income house-

holds mentioned care for elderly persons, discrimination in housing and employment and day care centers as problems which local government units were not trying to solve.

The number of moderate income households has been projected to increase by 63 percent from 1970 to 1990. In the latter year, the median annual income of these households may reach a level of $23,700. Translating income to purchase price and rent level of housing, moderate income households in 1990 could afford a $59,000 single family home or an apartment renting for more than $400 monthly.

Middle Income Households

The median household size for middle income households is 3.6 persons. Over 95 percent of these households have a male head and all heads (either male or female) have a median age of 42 years. Nearly 95 percent of the middle income households are white. The median household income earned by all households is approximately $13,000, with less than half of one percent receiving public assistance.

Nearly 70 percent of the middle income households live in single family units; a slightly larger proportion, 74 percent, own the unit they live in. Monthly payments for owners averaged $191 while the reported median value was $34,700. In relation to household income, owners had a monthly payment to income percentage of 17 and a value-income ratio of 2.6. Renters paid a lower monthly rent, and a slightly lower rent to income percentage, 14 percent.

Less than 3 percent of middle income households reported that their unit was in "poor" or "bad" condition. A much larger proportion, 17 percent, replied they would move to a different house within a year. About 38 percent

of all residents in the middle income group would stay within the same area or community if they moved to a different unit. About 80 percent of the middle income households would own if they changed residences.

Seven-tenths of the households feel safe from housebreakers in their present area of residence. Less than 6 percent feel alienated from society in general or their particular community. Dissatisfaction was voiced over the lack of nearby indoor and outdoor recreation facilities. Middle income households did report drug addiction, petty crimes and care for the elderly and handicapped as problems in their areas. In addition, at least 60 percent felt thta local government was not doing enough to solve problems for elderly persons needing care, discrimination in housing, care for physically handicapped, and provision of day care centers.

Over the two decades 1970 to 1980 and 1980 to 1990, the number of middle income households is projected to increase by 63 percent over the estimated 1970 level. At the end of this period, 1990, median household income is projected to be $40,600, while the median value of houses which could be occupied and rent levels which could be paid are projected as $101,700 and over $400 per month, respectively.

Elderly Households

Half of the households headed by an individual over age 65 have less than 1.7 persons. Seven-tenths of all elderly households are headed by a male; about 4 percent of the households receive public assistance; 90 percent of the elderly households are composed of whites; median income of elderly households was $5,400.

Less than half of the elderly households, 46 percent, live in a single family house; however, 56 percent own

their unit. For the owners with mortgages, the median monthly payment is $147, about 33 percent of their monthly income. The median value of single family homes is reported as $34,000, or 6.3 times annual income. For the elderly households which rented, the median monthly rent was $105 or about 23 percent of monthly income.

Nearly 6 percent of the housing occupied by elderly households was classified as in "poor" or "bad" condition. Eighteen percent of the elderly households planned to move in the year following the interview while 15 percent reported they had moved during the three preceding years. About two-fifths of all households would prefer to own if they moved; 63 percent would like to stay in the same community as they presently live.

Over two-thirds (69 percent) of the respondents from elderly households feel safe from housebreakers. However, about 15 percent of the households indicated they were relatively isolated from society and the community. The major service lacking in the areas where elderly households reside is recreation (indoor and outdoor). In addition, petty crime is reported as a problem in the neighborhood. Moreover, elderly households feel local government is not doing enough to solve the problem of discrimination in employment.

The number of elderly households is projected to grow by nearly 50 percent by 1990. By this terminal year, elderly households are projected to have a median income of $18,800 and occupy either single family housing costing a median of $44,500 or rental units at a median rent level of $375 per month.

Large Households

Large households have a median of 6.9 persons. Ninety-three percent of the large households have a male head; the median age of all heads (male or female) is slightly

over 40 years old. A little less than 8 percent of the large households receive public assistance as a source of income. The median income for all these households was $11,300 in 1968. About 85 percent of the large households are white.

Nearly 70 percent of the large households lived in a single family home and approximately the same proportion owned their unit. For the owner households, with a mortgage, the median monthly payment was $191, while the median value of all single family housing occupied by large households was $37,200. Relating these costs to income results in monthly payment to income ratio of 20.2 percent and a value to income ratio of 3.3. Large households which rented their quarters paid $130 monthly for a rent-income ratio of 13.8 percent.

About 4 percent of the large households reported their unit was in "poor" or "bad" condition. Nearly a quarter of the residents had moved to their present home within the past three years and about 20 percent plan to move to a different home within one year. Slightly less than 80 percent of the large households would own if they moved; about half of all movers would relocate in the same community.

Seven-tenths of the large households feel their home is safe from housebreakers. Other problems mentioned were lack of recreation services, drug addiction and need for family planning services. Local government, in the opinion of at least 60 percent of the large households, was not doing enough to solve the problem of lack of day care centers. In spite of these problems or lack of facilities, only 13 percent of the large households indicated alienation from society in general or from their community in particular.

The number of large households is projected to rise by 50 percent during the 1970 to 1990 period. By the ter-

minal year, the median household income will be a projected $23,600 and owner households could afford to purchase an $83,000 single family house. Renters could afford an apartment costing more than $400 a month.

Non-White Households

Half of the non-white households have more than 3.3 persons per household, while about two-thirds have a male head. The median age of the head (either male or female) is 40 years. Over a third of the non-white households receive funds from public assistance as part of their total household income. Median income for all non-white households was $6,200 in 1968.

Slightly less than a quarter of the non-whites live in a single family unit while an even smaller share (16 percent) own their home. This distinction indicates that some non-white households are renting single family units. All renters, as a group, pay a median rent of $114 or 22 percent of their monthly income. On the other hand, owners with mortgages pay median monthly payments of $175. All non-white households living in single family units valued their home at a median of $30,700.

Nearly 20 percent of the non-white households reported their unit was in "poor" or "bad" condition. About 43 percent of all non-white households moved to their present unit within the three years previous to the interview while nearly 32 percent plan to move within a year after the interview. For those who would move, 45 percent indicated they pefer to own. About 60 percent would like to remain in the same area in which they presently live.

Non-white households reported a lack of parking spaces and recreation facilities in their neighborhoods. In addition, they mentioned drug addiction, petty crimes, juvenile delinquency, discrimination in housing and unemployment

as problems in their areas. At least 60 percent of the non-white households felt that local government was not trying to solve mental illness, care for elderly persons, housing and employment discrimination and lack of day care centers problems. Direct contact between the non-white households interviewed and the remainder of society and the community in which they resided is not prevalent for 36 percent of households. These 36 percent report high alienation from the surroundings, indicative of the social and environmental isolation of at least some of the non-white households.

From 1970 to 1990, the number of non-white households is projected to increase by 113 percent. By the terminal year, non-white households, as a group, are projected to have a median income of $32,200. This implies the ability to own an $80,800 single family home or to rent an apartment costing more than $400 per month.

These condensed profiles of the six types of sub-group households are a first approximation of the characteristics, attitudes, and problems of the groups. Even though specific programs tailored to the various sub-group household problems and circumstances is postponed until a later report, there are several areas of problems and overall conditions which form the framework for programs:

(1) Although low income and non-white households differ in household characteristics, the housing occupied by these two groups appears to be similar. However, poor environmental or poor social conditions are not limited solely to low income and non-white households.

(2) Based on the attitudes of residents, housing problems (the condition of the unit, the amount of rent paid) are not as important as the more general neighborhood or community problems (drug

addiction, petty crime, juvenile delinquency, lack of recreation).

(3) The lack of involvement in the community (as indicated by high anomie), the relatively high rate of moving, on the part of low and non-white households, increases the difficulty of "reaching" some of these households to affect change. In addition, there appears to be little support for self-generated programs when a high degree of isolation is prevalent.

(4) Elderly and large households have more of a problem with housing than with their environment due to their particular needs for specific types of units. Elderly households need cheaper multi-unit housing while large households seek large single family homes.

(5) Moderate and middle income households share some of the difficulties in finding a home at costs they can afford and also feel the need for improvements in community services (recreation) and elimination of problems such as petty crime, drug addiction and care for the elderly.

Figure 2, Median Persons Per Household.

(See opposite ☞)

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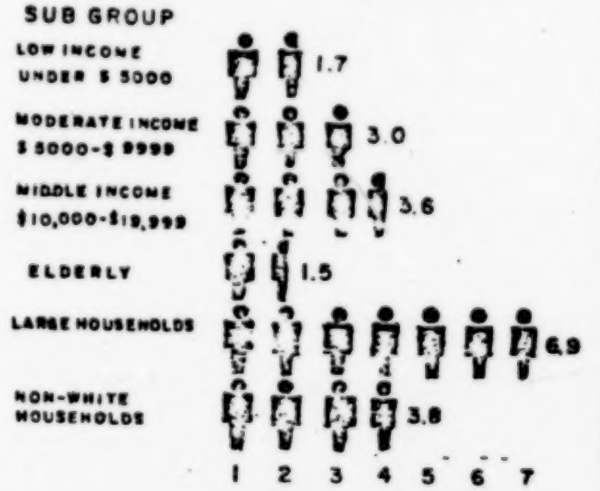
FIGURE 2

MEDIAN PERSONS PER HOUSEHOLD
BY SUB-MARKET GROUPS, 1968



The median number of persons in households is smallest in low income and elderly households.

Information gathered in the household survey relating to the characteristics of housing units points toward specific needs of particular sub-groups. These data reveal the general similarity among all sub-group housing units.

(1) only large households have a persons per room ratio of greater than 1.0, indicating overcrowding;

(2) low and middle income, and non-white households are more likely to rent their quarters and live in high rise buildings;

(3) low income households have a median rent to income ratio of 38 percent, well over the 25 percent "normal" levels;

Figure 3, Median Household Income.

(See opposite ☞)

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(4) low income, elderly, and non-white households all have median monthly payment ratios in excess of 25 percent of their income;

(5) median value of home to income ratios of greater than 2.5 are reported by all types of households, but low income, elderly, and non-white owners have ratios of 5.0 or more;

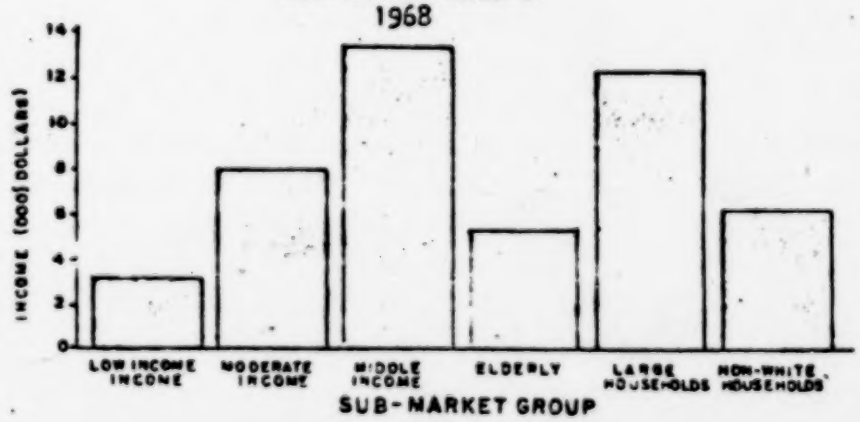
(6) low income and non-white households are the most mobile of the sub-groups;

(7) non-white households moved from out of New York State to Westchester County to a greater extent than other sub-group households (Table 12).

The excessive rent, monthly payment, and value to income ratios indicate the generally high cost of housing in the County. While the sub-groups with lower incomes are at a greater relative disadvantage, all sub-market groups are confronted with high priced housing (Figure 4). Since the monthly payment to income ratio is always larger than the rent to income ratio, housing expenses appear to fall more heavily on households who own compared to those who rent.

FIGURE 3

MEDIAN HOUSEHOLD INCOME OF SUB-MARKET GROUPS 1968



Middle income and large households have the highest median household incomes, $13,400 and $11,300, respectively.

Elderly, large and non-white households will be able to afford higher rent payments than low income households. By 1980, elderly households are projected to be able to pay a median of $222 for their rental units while both large households and non-white households will pay over this amount, $400 and $362, respectively.

For the 1980 to 1990 period, rents for all sub-groups will continue to rise as income increases. Low income households are projected to be able to pay a maximum of $308 (with a median rent of $202) while the middle income households could spend at least $650. Moderate income households could afford rents between these two extremes on a monthly basis. Elderly, large and non-white households are also projected to be able to pay a median rent of about $400 monthly in 1990 (Table 19).

B. *Availability of Housing for Sub-group Households*

The need for housing suitable for sub-group households has been examined in terms of the present and future characteristics of these households and the housing they occupy; the remaining aspect is the availability of units. From 1970 to 1980, the number of single family units available has been projected to rise from a total of 144,330 to 166,790.[1] The number of units projected to be available at different values is compared to the number of households in each sub-group able to afford the values. Two distributions of the need for units is presented on the following tables. The first assumption is that, the preferences of the sub-group households as expressed in the household survey and shown in Table 18 are the basis for the needs for housing. The second assumption is that

[1] Interim Report #3, *Growth of Demand and Supply, 1970-1990,* Westchester County Department of Planning, 1970, Table 14.

there will be no change in the overall tenure status (type of structure)[2] from 1968 to 1990. These two approaches to the needs for future housing depict different needs for units. Generally, the preferences approach yields more of a need for single family housing in the future (1980 and 1990) than does the continuation of the 1968 tenure status approach (Tables 20 through 23). On the other hand, continuation of the 1968 tenure status results in a larger need for multi-unit housing compared to the preferences approach.

While it is possible (indeed likely), that neither of these two assumptions are accurate projections of the type of structure-tenure needs of sub-group households, both indicate the need for additional construction of lower cost housing in both 1980 and 1990. In 1980, at the minimum, using the preferences assumption, there is projected to be an under supply of at least 4,000 single family units. On the other hand, under the tenure assumption no undersupply is projected for single family units for 1980 (Table 20). Using the preferences data as indicative of the minimum needs results in an over-supply of multi-family units renting for less than $159, but under the tenure assumption, there is a slight undersupply of these low-rent units,[1] (Table 21).

By 1990, the shortage of both lower cost single and multi-family housing units persists under either assumption

[2] For the purposes of these calculations an owner is assumed to occupy a single family unit while renters are assumed to live in multi-unit structures.

[1] Even though the table entries can not be added vertically, it is possible to form conclusions regarding deficits or surpluses due to the needs of the low, moderate and middle income groups. These three components are mutually exclusive compared to each other, but not with regard to the elderly, large, and non-white households.

concerning demand (Tables 22 and 23). If the demand is based on preferences, the shortage will be smaller for multi-family units renting for less than $150 by low income households than if the assumption utilizing the 1968 tenure distribution comes to fruition. The projected shortage of single family housing selling for less than $30,000 will be more extreme under the preference assumption compared to a continuation of the 1968 tenure status to 1990.

In both 1980 and 1990, there are several factors which can have an impact on the demand-supply balance. These factors will tend to obscure the specific relationships between the need for housing at a certain cost level and the supply of housing at that cost level. The first factor is that households which have occupied their unit for a long period of time, 10 or 20 years, may have a low value or rent to income ratio. For example, a household earning $6,000 and purchasing a home in the early 1950's for $15,000 would have had a 2.5 value to income ratio. If by 1970 their income had risen to $15,000, but the market value of their home was placed at $30,000 their current value to income ratio would be 2.00, a drop from the 1950 level. This household would be assumed to be able to

Table 20.

(See opposite ☞)

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TABLE 20

AVAILABILITY AND NEEDS OF SUB-GROUP HOUSEHOLDS FOR SINGLE FAMILY UNITS, BY VALUE LEVEL WESTCHESTER COUNTY, 1980

Assuming Resident's Preferences are Fulfilled

	Value of House* (In thousands)				
Type of Household	Less than $30.0	$30.0 to $49.9	$50.0 to $74.9	$75.0 to $99.9	$100.0 or more
Low income	15,557	---	---	---	---
Moderate income	18,250	31,640	---	---	---
Middle income	---	18,031	63,763	---	---
Elderly	14,800	6,028	3,229	1,615	1,738
Large households	5,448	7,028	6,528	2,929	3,674
Non-white	5,105	4,954	4,168	1,172	1,339
Assuming no change in the 1968 distribution by tenure status					
Low income	10,042	---	---	---	---
Moderate income	6,144	10,652	---	---	---
Middle income	---	20,524	52,056	---	---
Elderly	17,040	6,978	3,831	1,869	1,432
Large households	4,463	5,783	5,363	2,389	2,997
Non-white	1,622	1,575	1,325	372	426
Units projected to be available	19,669	47,167	41,033	30,579	28,342

*Table entries can not be added vertically.

Source: Estimates by consultant and Interim Report #3, The Growth of Demand and Supply, Westchester County Department of Planning, 1970, Table 14.

Table 21.

(See opposite ☞)

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TABLE 21

AVAILABILITY AND NEEDS OF SUB-GROUP HOUSEHOLDS
FOR MULTI-UNIT HOUSING BY RENT LEVEL
WESTCHESTER COUNTY, 1980

Assuming Resident's Preferences are Fulfilled

Type of Household	Rental Ranges*					
	Less than $150	$150 to $199	$200 to $199	$250 to $299	$300 to $399	$400 or more
Low income	26,314	5,275	---	---	---	---
Moderate income	---	3,476	7,184	7,329	10,978	---
Middle income	---	---	---	---	2,374	13,246
Elderly	9,685	3,342	2,549	2,407	3,399	6,939
Large households	539	111	366	395	805	2,603
Non-white	2,326	1,478	1,476	1,528	3,160	7,414
Assuming no change in the 1968 distribution by tenure status.						
Low income	30,908	6,196	---	---	---	---
Moderate income	---	7,447	15,391	15,701	23,521	---
Middle income	---	---	---	---	3,896	21,738
Elderly	8,236	2,842	2,167	2,046	2,890	5,900
Large households	1,056	219	724	781	1,590	5,151
Non-white	3,857	2,446	2,446	2,533	5,238	12,260
Units projected to be available	27,097	35,480	33,649	25,260	29,938	28,296

*Table entries cannot be added vertically.

*Source: Estimated by consultant and Interim Report #3, Growth of Demand and Supply: 1970-1980; Westchester County Department of Planning [illegible], Table 16.

afford a $42,500 house, but they actually occupy a $30,000 house. In terms of the value to income ratios, the $30,000 house should be occupied by a household with $12,000 income. This continued occupancy of housing by households when the household could afford a more expensive unit absorbs part of the supply of houses available for lower income households.

The second absorbing factor results from the occupancy of lower rent units by higher income households as described above. However, it is further complicated by the fact that rent control continues to keep down the rents of some units built before 1947. Again, the rent-income relationships is thrown out of alignment, resulting in households with higher income occupying units renting for less than 25 percent of their monthly income.

A third factor which complicates the supply-demand relationship for housing is the overall shortage of units for all income levels as well as the specific shortage of housing (public or private) for low income households. A final barrier is the negative attitudes of many residents of the county toward additional housing or the occupancy of existing housing by minority groups, especially if the housing is moderately priced or publicly supported.

The projected median costs of housing by Planning Area[1] indicate that in 1980 single family housing costing $50,000 or less is projected to be available in Planning Areas I, VII, and VIII. Median values of $60,000 and $70,000 are projected for Planning Areas III, IV, and V while housing in Planning Areas II, VI, IX are valued in the $80,000's and $90,000's (Table 24). In 1980, multi-unit quarters renting for medians of less than $250, are anticipated to be

[1] Prepared as part of the projections discussed in Interim Report #3, *Growth of Demand and Supply, 1970-1990,* Westchester County Department of Planning, 1970, Tables 15 and 17.

available in Planning Areas I, IV, VI, VII, and VIII. More expensive rental units (between $250 and $300 monthly rent) will be located in Planning Area IX, while units with median monthly costs of over $300 will be in Planning Areas II, III and V (Table 25).

Excerpts From Residential Analysis, Westchester County, Interim Report 7—*Welfare: Households and Housing*, Plaintiffs' Exhibit "I".

SUMMARY

Payment of shelter costs to public assistance recipients represents one of the oldest forms of direct intervention by Government in the housing market. Although the payments are direct in form, being made by the Department of Special Services, the Department is not directly involved in the market place; the payments are made directly to the recipient, who is responsible for obtaining housing through his own efforts. With a few exceptions, notably with regard to housing code enforcement, the Department of Social Services has neither the authority nor the staff to play an active role in the provision of housing for recipients.

In Westchester County, as of the spring of 1970, the public assistance caseload, totalling some 43,000 persons, was equally divided between whites and blacks. As a subgroup of the two larger groups, persons with a Spanish surname accounted for about 6 percent of all recipients.

Most (70 percent) of the recipients either came to Westchester County before 1958 or have always lived in the county. The bulk of the whites are natives of New York State. Most of the black recipients came directly from the south: Virginia, North Carolina, South Carolina, Georgia and other South Atlantic States.

Whites receiving public assistance are generally older than blacks or recipients with a Spanish surname: half of the white families and two-thirds of the black families are headed by women without mates; educational levels of heads of households are low; occupations held are those of laborers, service or household workers.

Interim Report 7—Welfare: Households and Housing—Westchester County.

The overwhelming proportion (95.3 percent) of public assistance recipients are tenants; only 5.9 percent of the whites, 3.4 percent of the blacks and 1.9 percent of respondents with a Spanish surname owned their dwelling units.

Part of the problem of public assistance recipients living in housing in poor condition lies in the responsibility for maintenance. There appears to be considerable confusion as to responsibility; thus, most recipients interviewed said that the landlord was responsible for major repairs (e.g., cracked walls, defective heating systems, etc.), for painting the outside of the building and for snow removal. On the other hand, about 25 percent of the recipients said that they were responsible for removing garbage, painting the apartment, or cleaning halls and stairways.

There is a substantial degree of overcrowding (more than one person per room) in units occupied by recipients. Nearly half of all large families of 6 or more persons lived in overcrowded units. Also, one-parent families had less bedroom space than two-parent families, even though the size of family was substantially the same for the two groups.

As mentioned above, most recipients are tenants. Their average (median) rent level is about $100 per month. Recipients, both black and white, living in public housing paid a monthly rent of $86, some $20 less per month, on the average, than that paid by recipients living in private housing units ($107).

What are the conditions of housing lived in by public assistance recipients? Responses to a personal interview survey of over 1,000 households receiving public assistance revealed the following:

Condition	Percent of Respondents Reporting Condition		
	White	Black	Spanish Surname
Lack of janitorial services	37.2	44.3	44.6
No Laundry facilities in building	65.6	70.5	77.2
No protection of front doors through a tenant-controlled buzzer system	60.4	67.5	73.7
Apartment not painted in last five years	68.7	66.3	59.6
Cracked or broken ceilings	23.2	37.3	33.9
Water leaks in walls or ceilings ..	14.5	27.2	15.8
Falling plaster from walls or ceilings	12.4	23.5	22.4
Broken steps in staircase	5.3	9.6	8.6
Lack of heat during cold weather	14.1	25.1	20.7
Rats or mice	7.9	27.4	39.7
Vermin, including roaches and ants	24.6	51.3	51.7

How people find out about housing is an important part of what kind of housing they obtain, as well as their plans for future moves. The public assistance recipient, lacking many of the "contacts" or knowledge about housing, has no entry into the formal system (real estate brokers, dealers, builders, etc.). He relies heavily instead, on friends and relatives to help him find housing. Despite exposure to public assistance, fewer than ten percent obtained their housing through the Department of Social Services. That help was not obtained from voluntary social agencies is indicated by the fact that very few of the private agencies were known to respondents. However, about 20 percent of the black respondents knew about anti-poverty groups. A further indication of the recipient lack of knowledge about the rental process is that few respondents had any information concerning the rent control status of their units.

Generally, both white and black respondents moved to Westchester only to be close to family and job opportunities. To a considerable extent, blacks rented their current housing because they "had no choice". Having chosen a unit in a particular neighborhood, most respondents would prefer to move to another house within a few blocks of their current residence or in the same community. This desire not to move very far from their present location held especially for blacks, despite the fact that more black than white respondents gave negative responses about their neighborhood: Don't like neighborhood"; "slum neighborhood"; "come only if you have to". On the other hand, while white respondents would not recommend their neighborhood to friends, many did not know where they wanted to move should they be obliged to leave their current living quarters. Whites who did state a preference, chose to remain within the same neighborhood, the same community, or elsewhere in Westchester. Some of the respondents had relatives and friends in the community or neighborhood, and had frequent contact with their relatives and friends.

As indicated above, the choice to remain in the neighborhood was despite an awareness that many problems existed in the area. These problems were identified as: Petty crime, juvenile delinquency, drug addiction, unemployment, unsupervised children, lack of day care facilities for working mothers, and out-of-wedlock children. Blacks were more aware of neighborhood problems and of job and housing discrimination than were whites.

Blacks were aware of neighborhood social problems more than whites. Blacks also did not feel that anything was

being done by public and private groups to solve these problems. On the other hand, although whites, as a group, did not indicate as many social problems, as did blacks, the whites felt that the authorities were trying to solve these problems.

While public assistance recipients generally felt anomic, that they could not hope to improve their present position, blacks had a much higher level of anomie than whites. Despite the high level of anomie, nearly half of the black families participated in the political life (political elections) of the community since, it would appear, they were seeking change in conditions; nearly a third of the blacks were involved with school and community action elections. The white respondents, on the other hand, were relatively uninvolved with such decisions.

The welfare client has little access to formal systems in housing, education and employment since he belongs to few formal organizations (professional organizations, League of Women Voters, etc.) with the exception of the Church. Instead, he is forced to rely for help on informal networks, such as friends and relatives, in order to locate housing. Frequently, such informal channels are without much influence in the welfare system since the recipient has remained for long periods of time in housing in which he is unhappy and which is reported to have many problems.

The poor receive little in the way of housing services. Often, unable because of limited resources or experience, to maintain basic housekeeping functions, welfare clients have been labeled as destructive and poor tenants. This has further deepened their feelings of rejection by society, thus resulting in high alienation.

Poor neighborhoods are not necessarily completely "disorganized" neighborhoods. The welfare client maintains complex kinship networks which operate to provide him

with considerable support, especially in time of emergency. Because of these networks which exist in his neighborhod, the welfare client, in seeking better housing is not necessarily requesting removal from neighborhood or community. Often, this means that rehabilitation of existing units is as much if not more, a prerequisite for a housing program than is clearing of sites for the construction of new units, especially if the latter involves relocation to another part of the community or to another community.

Since a minimum of a quarter of public assistance recipients have serious problems with their housing units, some 4,400 units would have to be rehabilitated or replaced. If the caseload rises by some 50 percent over the next five years, or half the rate of increase for the last five years, then by 1976, another 2,600 units would require either rehabilitation or replacement.

Number of Rooms and Number of Persons

Generally, 4.4 rooms was the median size of a unit occupied by public assistance recipients; of this number, 2.4 rooms were used as bedrooms, and the size of household averaged somewhat under 4; however, white households, containing many more elderly persons proportionately, were smaller (2.9 persons) than black families (4.1 persons). Overcrowding (more than one person per room) was substantially greater where the size of family was larger. 31.1 percent of black families reported more than one person per room, compared to 16.8 percent for whites (Table H-1). For Westchester's total renter population in 1970, the comparable figures for overcrowding were 17.7 percent for blacks and 7.4 percent for whites.

Considering overcrowding by size of family, it is apparent that overcrowding is a far greater problem for the large family, containing 6 or more persons than it is for the

smaller family. Yet, more than one out of every four middle-sized families (3 to 5 person) receiving public assistance was living in overcrowded quarters (Table H-8). More than one person per room is considered a measure for substandard housing since the housing unit then is too small to accommodate satisfactorily the number of persons occupying the unit.

Rooms without windows and kitchens without running water were the most serious deficiencies in facilities, according to recipients (Table H-9). Black families and families with a Spanish surname had the greatest incidence of missing facilities, while the poorest conditions were reported in the White Plains, Portchester, and New Rochelle areas. Generally, at least two, if not three or more, families shared kitchens and bathrooms, where these were not private and separate units (Tables H-10 and H-11).

The lack of facilities was especially significant in structures containing two or more families (Table H-12). The failure of at least half of all units to have fire escapes indicates that a serious problem would exist in event of a fire; this problem is accentuated by the fact that few multi-family units have a fire sprinkler system and about one out of every three does not have more than one exit in case of emergency[1]. As indicated in Table H-12, fire hazards are greater for black and Spanish surname respondents than for whites, although they are still serious for the latter group.

[1] Fire escapes are not necessarily required for all types of multi-unit structures; about two-thirds of respondents, however, do live in five or more family units where fire esscapes are probably called for. Sprinkler systems, also, may not be required under the housing code of the community.

Table H-1.

(See opposite ☞)

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TABLE H-1

CHARACTERISTICS OF FAMILIES AND HOUSING UNITS OCCUPIED BY PUBLIC ASSISTANCE RECIPIENTS, BY RACE AND AREA

Race				Area					
						White Plains			
	Total	White	Black	Spanish Surname	Yonkers	Mt. Vernon	Portchester New Rochelle	North County
Number of persons (median)	3.7	2.9	3.9	4.6	3.9	3.9	3.6	2.9
Number of rooms (median)	4.4	4.2	4.4	4.3	4.5	4.4	4.3	4.2
Percent overcrowded (more than one person per room)	27.1%	16.8%	31.1%	39.2%	N.A	N.A	N.A	N.A
Number of rooms used as bedrooms (median)	2.4	2.2	2.5	2.4	2.5	2.5	2.3	2.2
Percent reporting roomers or boarders	8.2%	7.8%	9.2%	---	7.2%	8.9%	8.8%	8.1%
Percent renters	96.4%	95.1%	96.7%	98.2%	96.2%	93.8%	98.3%	96.0%
Percent in public housing	17.6%	12.1%	21.5%	8.9%	19.2%	14.6%	19.4%	13.5%
Monthly rent paid (median)	$99	$97	$99	$109	$97	$106	$97	$105
Monthly rent-public housing	$86	$73	$88	$99	N.A	N.A	N.A	N.A
Monthly rent-private housing	$106	$102	$109	$110	N.A	N.A	N.A	N.A
Percent reporting increase in rent	34.1%	38.7%	32.8%	29.3%	33.4%	34.8%	30.7%	42.8%
Percent increase in rent	15.6%	15.0%	16.3%	14.0%	14.6%	16.5%	16.2%	16.3%
Percent increase - Reporting housing	20.7%	25.0%	20.0%	20.0%	N.A	N.A	N.A	N.A
Percent increase - private housing	13.3%	12.4%	14.1%	12.5%	N.A	N.A	N.A	N.A
Years of education completed (median)	10.5	10.3	10.7	8.7	10.5	11.0	10.6	9.8

N.A. - Not available

Table H-1, Family and Housing Characteristi

Source: Household Survey, Westchester County, 1968

Interim Report 7—Welfare: Households and Housing—Westchester County.

TABLE H-8

OVERCROWDING (MORE THAN ONE PERSON PER ROOM), BY SIZE OF FAMILY AND RACE

Size of Family	*Total*	*White*	*Black*	*Spanish-Surname*
1	...	...	...	...
2	6.4	1.7	8.5	14.3
3-5	27.1	24.3	27.9	29.4
6 or more	67.2	61.0	68.3	66.7
Total	27.1	16.8	31.1	39.2

Source: Household Survey Westchester County, 1969, 1970.

Table H-9.

(See opposite ☞)

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TABLE H-9

FACILITIES MISSING IN HOUSING UNIT
ACCORDING TO PUBLIC ASSISTANCE RECIPIENTS,
BY RACE AND AREA

Facilities Missing	Percent Reporting Problems						
	Total	Race			Area		
		White	Black	Spanish Surname	Yonkers	Mt. Vernon	White Plains Portchester New Rochelle	North County
Central heating	10.0	6.7	11.9	8.3	9.4	4.1	14.1	11.0
Hot running water	2.4	1.3	3.0	3.3	3.1	1.0	3.5	0.6
A separate and private kitchen	9.1	5.4	11.3	1.7	4.0	8.8	15.3	8.4
Rooms without windows	16.7	20.2	14.1	25.0	19.0	11.3	12.9	24.3
Kitchen without running water	19.9	17.6	19.9	35.0	18.8	23.4	20.3	18.5
Own bathroom	9.5	8.0	10.6	3.4	5.5	7.8	14.8	9.7
Electrical wall outlets	2.4	1.0	3.2	1.7	2.4	3.1	1.0	4.5

Source: Household Survey Westchester County, 1969, 1970.

Table H-10.

(See opposite ☞)

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TABLE H-10

DISTRIBUTION OF FAMILIES SHARING KITCHEN ACCORDING TO PUBLIC ASSISTANCE RECIPIENTS, BY RACE AND AREA

Number of Families	Percent Reporting							
		Race			Area			
	Total	White	Black	Spanish Surname	Yonkers	Mt. Vernon	White Plains Portchester New Rochelle	North County
Two	50.7	37.5	53.9	---	---	64.2	50.1	20.0
Three	27.6	25.0	25.0	100.0	50.0	28.6	16.7	80.0
Four	9.2	---	11.5	---	33.3	7.2	13.9	---
Five	1.7	---	2.0	---	---	---	2.7	---
Six or more	10.8	37.5	7.6	---	16.7	---	16.6	---
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

Source: Household Survey Westchester County, 1969, 1970.

Table H-16.

(See opposite page)

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TABLE H-16

PROBLEMS OF HOUSING UPKEEP ACCORDING TO PUBLIC ASSISTANCE RECIPIENTS, BY RACE AND AREA

	Percent Reporting Problems							
		Race			Area			
Type of Problem	Total	White	Black	Spanish Surname	Yonkers	Mt. Vernon	White Plains Portchester New Rochelle	North County
Apartment not painted in last five years	24.6	23.0	25.0	33.3	24.9	34.4	19.1	23.9
Cracked walls	40.6	32.6	45.0	39.7	47.5	43.9	33.2	35.3
Cracked or broken ceiling	32.4	23.2	37.3	33.9	37.2	35.3	28.6	27.
Water leaks in wall or ceiling	22.7	14.5	27.2	15.8	25.7	27.9	19.5	14.6
Falling plaster from ceiling or wall	20.3	12.4	23.5	22.4	22.0	23.8	19.6	11.3
Dark unlit halls	14.5	11.3	16.6	15.5	17.1	17.5	13.1	9.3
Dirty uncleaned halls	19.1	10.8	23.0	20.7	24.5	19.0	17.6	8.6
Dark unlit stairs	13.2	8.3	15.7	13.8	15.0	14.8	12.5	8.4
Broken steps in staircase	8.4	5.3	9.6	8.6	9.3	11.6	7.3	6.3
Lack of hot water for bathing purposes	13.8	9.5	16.2	10.3	15.4	16.3	13.6	7.1
Lack of heat in cold weather	21.5	14.1	25.2	20.7	25.3	24.1	21.6	9.2
Rats or mice	22.2	7.9	27.4	39.7	30.5	25.1	18.5	4.3
Vermin, including roaches and ants	43.3	24.6	51.0	51.7	55.3	50.3	37.3	14.9
Uncovered garbage in building	9.3	5.1	10.8	14.5	12.6	11.0	7.3	2.2
Garbage in street or backyard	11.6	7.5	13.3	10.9	14.1	11.7	10.1	7.4

Source: Household Survey Westchester County, 1969, 1970.

Table H-17.

(See opposite page)

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TABLE H-17

RESPONDENTS INDICATING PROBLEMS OF HOUSING UPKEEP NOT CORRECTED
ACCORDING TO PUBLIC ASSISTANCE RECIPIENTS,
BY RACE AND AREA

	Percent Reporting Problems							
		Race			Area			
	Total	White	Black	Spanish Surname	Yonkers	Mt. Vernon	White Plains Portchester New Rochelle	North County
Unit not painted in five years	74.7	65.0	77.8	85.7	73.3	73.3	76.5	80.0
Cracked walls in apartment	72.0	66.7	73.3	78.6	71.9	76.9	70.5	69.2
Cracked or broken ceiling	76.2	75.0	77.3	69.2	76.0	74.4	78.6	76.2
Water leaks in wall or ceiling	63.5	47.1	69.2	57.1	59.8	73.0	68.3	57.1
Falling plaster from ceiling or wall	75.0	76.9	76.7	57.1	73.7	77.8	77.5	75.0
Dark unlit halls	71.3	68.8	71.2	100.0	71.1	65.0	75.0	100.0
Dirty uncleaned halls	78.3	83.3	77.1	85.7	75.0	80.7	80.0	75.0
Dark unlit stairs	76.1	50.0	80.0	100.0	74.1	73.6	73.9	100.0
Broken steps in staircase	76.1	80.0	75.7	100.0	72.2	80.0	80.0	85.7
Lack of hot water for bathing purposes	69.0	68.4	69.7	100.0	68.3	70.6	71.9	71.4
Lack of heat in cold weather	65.7	63.3	65.9	75.0	69.0	65.5	65.4	50.0
Rats or mice	64.2	60.0	66.9	58.8	67.1	63.0	66.7	33.3
Vermin, including roaches and ants	44.3	30.0	46.2	54.5	42.4	45.8	53.9	7.1
Uncovered garbage in building	83.7	85.7	83.9	75.0	87.5	71.4	81.8	---
Garbage in street or backyard	82.3	62.5	84.6	100.0	95.5	88.9	80.0	---

/1 Called to attention of landlord or landlord's representative.

Source: Household Survey Westchester County, 1969, 1970.

Table H-17, Housing Upkeep Problems As Corrected

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REASON HEAD OF FAMILY CHOSE PARTICULAR HOUSING UNIT, ACCORDING TO PUBLIC ASSISTANCE RECIPIENTS, BY RACE AND AREA

Table N-11

Reason Chosen	Percent Reporting Problems							
		Race			Area			
	Total	White	Black	Spanish Surname	Yonkers	Mt. Vernon	White Plains Portchester New Rochelle	North County
Place accepted children	1.3	1.6	1.4	---	0.1	1.3	3.1	---
Had no choice	50.6	46.5	53.6	35.3	51.5	52.7	48.9	48.6
Better place (house or unit)	20.0	14.1	21.3	29.4	20.8	28.0	16.0	16.2
Better neighborhood	3.9	5.9	2.6	7.8	5.7	4.7	1.8	1.9
Convenient	7.9	11.4	6.7	7.8	4.9	6.0	8.4	17.1
Wanted to live in project	0.8	2.2	0.4	---	0.8	0.7	1.4	---
Poor condition of previous unit	0.8	---	1.2	---	---	2.0	1.3	---
Other	12.0	15.1	10.2	15.7	12.1	2.0	16.4	15.2
Don't know	2.7	3.2	2.6	3.8	3.8	2.6	2.7	1.0
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

Source: Household Survey Westchester County, 1969, 1970.

Notice of Intent to Change Public Assistance Status, Plaintiffs' Exhibit "J".[*]

LOUIS P. KURTIS
COMMISSIONER

JOHN J. ALLEN
DIRECTOR

COUNTY OF WESTCHESTER
DEPARTMENT OF SOCIAL SERVICES

DIVISION OF FAMILY AND CHILD SOCIAL SERVICES
NOTICE OF INTENT TO CHANGE PUBLIC ASSISTANCE STATUS

Phyliss D'Alessio
40 S. West Street
Mt. Vernon, New York

Category and
Case No.: F-015335

Date: 1/22/73

This is to advise you that this department intends to

( ) Discontinue
(X) Reduce from $336.00 to $292.40 your Public Assistance
( ) Suspend

grant on 2/1/73 (proposed date) for the following reason(s):

Quality control reports of 10/15/72 indicates that Mr. Mattrola resides with you and your family. Therefore we are pro-rating your rent ¾ of 175 = 131.40.

[*] Repeating Exhibit "E" to D'Alessio affidavit in support of motion, pp. 53-54, *ante*.

Notice of Intent to Change Public Assistance Status.

You may have a conference at the department address noted by the number at the bottom of this page to review your case at any time before the proposed date of change in the status of your grant.

R. Goldfinger RG

(Signed) (Date)

RIGHT TO A FAIR HEARING

If you believe the status of your assistance should not be changed, you may request a state fair hearing by telephoning 212-488-6550, or by writing to Fair Hearing Section, New York State Department of Social Services, 1450 Western Avenue, Albany, New York 12203. If you request a fair hearing, a notice will be sent to you informing you of the time and place of your hearing. At the hearing, you, your attorney or other representative will have an opportunity to present relevant written and oral evidence to demonstrate why the status of your assistance should not be changed, as well as an opportunity to question any persons who appear at the hearing and present evidence against you. If you request a fair hearing before the date proposed for the change in the status of your assistance, you will continue to receive your assistance unchanged, until the fair hearing decision is issued.

Memorandum From Rachel Goldfinger to Phyllis D'Alessio, Plaintiffs' Exhibit "K".[*]

1/30/73

Dear Mrs. D'Alessio,

We are sending you an additional check of $43.60 in addition to your regular recurring grant of $292.40. For the month of February. As of March 1, 1973 we will be sending you just $292.40 per month. Perhaps this can give you some time to make the necessary adjustments.

Very truly yours,

(Mrs.) Rachel Goldfinger
(Inc. Maint. Sup.)

[*] Repeating Exhibit "F" to D'Alessio affidavit in support of motion, p. 55, *ante*.

Westchester County Maximum Shelter Allowance Schedule, Plaintiffs' Exhibit "L".

COUNTY OF WESTCHESTER
Department of Social Services
432 County Office Bldg.
White Plains, N. Y. 10491

IV. Shelter

A. *Rent*

Rent is allowed as paid, based on family or individual housing needs and on local low-cost rent levels for housing and rooms furnished and unfurnished.

(Special approval of the Administrative Supervisor, PA Section, for rent in excess of the following schedule must be requested on Form #664.)

Rent Schedule SA-9
Allowance Schedule—Unfurnished—Heat Provided
Effective 7-1-72

	*Monthly Maximum Rent**	
	With Heat	*Without Heat*
1-2 Persons, 1 room "as paid" to a maximum of	$145	$107

* Note: The determinant for approval for a monthly rent is the number of rooms in a unit and not the number of persons in a family.

The number of persons represents a guide and suggests the minimum number of persons in a family for which approval for a particular sized apartment rental is given. For example, a 5 room unit would not be approved for one person occupancy, nor should a seven person family occupying 6 rooms be approved at the rate for a 7 room unit.

1-2 Persons, 2 room studio or shared apt. "as paid" to a maximum of ..	155	118
2-3 Persons, 3 rooms (1 Bedroom) "as paid" to a maximum of	166	129
3-4 Persons, 4 rooms (2 Bedrooms) "as paid" to a maximum of	182	145
3-4 Persons, 5 rooms (2 Bedrooms) "as paid" to a maximum of	198	166
5-6 Persons, 6 rooms (3 Bedrooms) "as paid" to a maximum of	247	209
7-8 Persons, 7 rooms (4 Bedrooms) "as paid" to a maximum of	279	236
9-10 Persons, 8 rooms (5 Bedrooms) "as paid" to a maximum of	322	263
11 Persons and over, 9 rooms and over "as paid" to a maximum of ..	359	283

Water Charges

When the tenant recipient is obligated to pay for water as a separate charge, an additional allowance shall be made for the amount required to be paid.

Shelter—Living in Self-Maintaining Household

For children or adults residing with a self-maintaining non-legally responsible relative or friend, the allowance

for rent and/or shelter costs shall be computed on a pro-rated basis.

Rent—While in Medical Facility

An allowance for rent shall be made for a period not in excess of 60 days, when essential to retain a housing accommodation to which a recipient temporarily receiving care in a medical facility may return upon discharge.

Public Housing

An allowance for rent shall be made for recipients who are tenants of State or Federally-aided public housing not in excess of the following schedules:

	Monthly Rent		
Apartment Size	*State Schedule*	*New Rochelle* (Eff. 8-1-71)	*Peekskill* (Eff. 4-1-72)
"0" Bedrooms	$ 65.00	——	——
1 Bedroom	77.00	$ 84.00	$ 84.00
2 Bedrooms	90.00	99.00	99.00
3 Bedrooms	101.00	112.00	112.00
4 Bedrooms	107.00	120.00	120.00
5 Bedrooms	110.00	125.00	125.00

(NOTE: Required fees or charges shall be provided for such items as security deposit, extermination,

Westchester County Maximum Shelter Allowance Schedule.

deposit against breakage and loss, and keys. See Page A-17.)

B. *Shelter Allowance for Home Owners*

Purchase of Interest in Low-Cost Housing Development

The Administrative Supervisor may approve a grant, not to exceed $750.00 toward the purchase of an interest in a cooperative unit in the low-cost housing development. The Housing Supervisor shall first be asked to review this plan. Assignment of recipient's equity in such cooperative housing shall be required.

Carrying Charges

Property costs in lieu of rent are allowed when they are not in excess of a reasonable monthly rental. Such costs are estimated on actual bills and may include taxes, water rates, special assessments, and interest on mortgage. Fire insurance is allowed as paid when due.

Nassau County Maximum Shelter Allowance Schedule, Plaintiffs' Exhibit "M".

NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES
County Seat Drive
Mineola, L.I., N.Y.

MAXIMUM SHELTER SCHEDULE

Rent allowances shall not exceed this schedule.

Furnished Rooms

Furnished accommodations shall provide essential furniture and household equipment for daily living.

No. of Persons	*No. of Rooms*	*Inclusive Items*	*Rent Allowance*
1	1	Heat, Hot water, utilities	$110
2	1 double	"	125

Apartments and Houses

		With Heat	*Without Heat*
1–2	2–4	$145	$135
3	3–4	165	150
4	3–5	180	165
5–6	4–6	195	180
7–8	6–8	210	190
9	6–8	220	200

Add $25.00 a month for each additional person.

Hotel/Motel Accomodations

Payment for hotel or motel accomodations may be provided if approved only while other housing is unavailable. Minimum hotel/motel rates shall be paid in accordance with available facilities.

Effective 7/1/70 to present

Resume of Dr. Herbert J. Gans, Plaintiffs' Exhibit "O".

Biography and List of Publications—Herbert J. Gans

Place, Date of Birth:

Cologne, Germany; May 7, 1927, U.S. Citizen, 1945.

Education:

Ph.B., The College, University of Chicago, 1947.

M.A., Social Sciences, University of Chicago, 1950. (Thesis: Political Participation in a Suburban New Town: Park Forest, Illinois.) Phi Beta Kappa, 1950.

Ph.D., Department of City Planning, University of Pennsylvania, 1957. (Dissertation: Recreation Planning for Leisure Behavior: A Goal-Oriented Approach.)

Professional and Academic Positions:

Research Assistant, American Society of Planning Officials, Chicago, 1950.

Assistant Planner, Chicago Housing Authority, 1950-1951.

Chief Research Planner, P.A.C.E. Associates, Chicago, 1951-1952.

Field Representative, Division of Slum Clearance, U.S. Housing and Home Finance Agency, Washington, 1952-1953.

Research Associate, Institute for Urban Studies, University of Pennsylvania, 1953-1957. Lecturer, Department of City Planning, 1956-1957.

Assistant Sociologist, Department of Psychiatry, Massachusetts General Hospital and Harvard Medical School, Boston. 1957-1958. (On leave from University of Pennsylvania.)

Assistant Professor of City Planning, Institute for Urban Studies and Department of City Planning, University of Pennsylvania, 1958-1961; Lecturer, Department of Sociology, 1958-1959; Research Associate Professor of City Planning and Urban Studies, 1961-1964.

Associate Professor of Sociology and Education, Teachers College, Columbia University, 1964-1966; and Research Associate, Institute of Urban Studies, Teachers College, 1964-1965; Center for Urban Education, 1965-1966.

Senior Staff Sociologist, Center for Urban Education; and Adjunct Professor of Sociology and Education, Teachers College, Columbia University, 1966-1969.

Visiting Professor of Sociology, Columbia University, Spring 1969.

Professor of Sociology and Planning, Department of Urban Studies and Planning, M.I.T.; and Faculty Associate, M.I.T.—Harvard Joint Center for Urban Studies, 1969-1971.

Professor of Sociology, Department of Sociology, Columbia University, (Ford Foundation Chair) (1971- . Senior Research Associate, Center for Policy Research, 1971- .

Scholarly and Professional Offices:

Americal Sociological Association; Member, Council, 1968-1971.

Society for the Study of Social Problems; Chairman, Committee on Standards and Freedom of Research, Publication and Teaching, 1965-1966; Member, Executive Committee, 1968-1971.

Eastern Sociological Society; President-Elect, 1971-1972; President, 1972-1973.

Sociological Research Association; Member, 1972- .

Planners for Equal Opportunity; Board Member, 1964-1965.

Architects Renewal Committee for Harlem; Board Member, 1965-1967.

Advisory Editor: *Journal of the American Institute of Planners,* 1965- . Library of Urban Affairs, 1965- ; *Urban Life and Culture,* 1971- ; *Society* (Trans-action), 1971- ; *American Journal of Sociology,* 1972- ; *Public Opinion Quarterly,* 1972- . Journal of Communication, 1974.

Transaction, Inc. Member, Board of Directors, 1970- .

Research Grants:

Center for the Study of Leisure, University of Chicago, Summer 1957: "American Films and Television on British Screens."

National Institute of Mental Health, 1959-1960: "Characteristics and Aspirations of New Suburbanites" (Levittown study).

Annenberg School of Communications, University of Pennsylvania, 1960, for continuation of study: "American Films and Television on British Screens."

American Philosophical Society, 1961: "The Impact of Suburban Life on its Residents" (Levittown study).

Social Science Research Council, 1962: Levittown study.

Penjerdel (Pennsylvania-New Jersey-Delaware Metropolitan Project), 1962-1963: "The Origin and Development of a New Suburban Community" (Levittown study).

Urban Studies Center, Rutgers University, Senior Fellowship, Fall, 1963.

Bullitt Foundation, Seattle, 1964-1968: "The Shaping of Mass Media Content: An Analysis of the Creation and Decision-Making Processes in the Mass Media."

Ford Foundation, "Coverage of Social Issues in the News Media," 1969-1973.

National Endowment for the Humanities, "The Social Role of the News Media," 1973.

Major Consultant Activities:

Conservation Study, Metropolitan Planning and Housing Council, Chicago, 1952.

American Council to Improve Our Neighborhoods, New York, 1954, 1956.

Social Planning Division, Puerto Rico Planning Board, 1958.

Jack Meltzer Associates, Planners, Chicago, 1959, 1962.

U.S. Outdoor Recreation Resources Review Commission, Washington, 1961.

Urban Renewal Project, Menninger Foundation, 1962.

Community Progress, Inc., New Haven, 1962.

Housing and Home Finance Agency (Advisory Committee to the Administrator), 1962.

Fifth Annual Ruberoid Design Competition (Member of Jury), 1963.

Community Research and Development, Inc., Columbia, Maryland, 1963-1964.

Member, Planning Session, White House Conference to Fulfill These Rights, 1965.

Member, Seminar on Poverty, American Academy of Arts and Sciences, 1966.

Redevelopment Land Agency, Washington, D.C., 1966-1967.

Office of Social Development, Ford Foundation (Negative Income Tax Panel), 1967.

Secretary's Task Force on Exits from Poverty, Department of Health, Education and Welfare, 1967.

Department of Housing and Urban Development, Office of the Secretary, 1967.

National Advisory Commission on Civil Disorders, 1967-1968.

Wayne County Planning Commission, 1968.

Llewellyn-Davies Associates, Amherst New Town Project, 1969.

Corporation for Public Broadcasting, 1972.

North Pickering Community Development Project (Canada) 1973.

Irwin Miller Management Company, Columbus, Indiana, 1973.

Community Research and Action Laboratory, Columbia, Maryland, 1973.

PUBLICATIONS

I. *Books and Monographs*

1. *Accelerated Urban Growth in a Metropolitan Fringe Area,* Philadelphia: Institute for Urban Studies, 1953, Summary Report, pp. 82, mimeographed.
2. *American Films and Television Programs on British Screens: A Study of the Functions of American Popular Culture Abroad,* Philadelphia: Institute for Urban Studies, June, 1959, pp. 180, mimeographed.

3. *The Urban Villagers: Group and Class in the Life of Italian-Americans,* New York: Free Press, 1962, pp. 367. Paperback edition, 1965.
4. *The Levittowners: Ways of Life and Politics in a New Suburban Community,* New York: Pantheon Books, 1967, pp. 472. London: Allen Lane, The Penguin Press, 1967. Berlin: Bertelsmann Fachverlag, 1969. Vintage paperback edition, 1969. Florence: Saggiatore, 1971, Penguin Paperback, 1973.
5. *People and Plans: Essays on Urban Problems and Solutions,* New York: Basic Books, 1968, pp. 395. Paperback edition, 1971, Penguin paperback, 1972.
6. *The Uses of Television and Their Educational Implications,* New York: Center for Urban Education, June 1968, pp. 205.
7. *More Equality,* New York: Pantheon Books, 1973.
8. *Popular Culture and High Culture,* New York: Basic Books, 1974.

II. *Articles*†

1. "Park Forest: Birth of a Jewish Community," *Commentary,* Vol. II, April, 1951, pp. 330-339. Reprinted in E. Cohen, *Commentary on the American Scene,* Knopf, 1953, pp. 205-223; Mack, *Race, Class and Power,* American Book Company, 1963, pp. 201-216; R. O'Brien, C. Schrag and W. Martin, *Readings*

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† This list does not include film reviews, book reviews, or excerpts from my books published as articles in anthologies. Items preceded by an asterisk are reprinted in my *People and Plans;* items preceded by two asterisks are reprinted in my *More Equality.*

in General Sociology, Houghton Mifflin, 3rd ed., 1964, pp. 34-42; S. Feldman and G. Thielbar, *Life Styles,* Little Brown, 1972, pp. 274-287; Bobbs-Merrill Reprint Series in the Social Sciences, #90.

2. "Political Participation and Apathy," *Phylon,* Vol. 12, 1952, pp. 185-191.

3. "Planning and Political Participation: A Study of Political Participation in a Planned New Town," *Journal of the American Institute of Planners,* Vol. 19, 1953, pp. 3-9.

4. "The 'Yinglish' Music of Mickey Katz: A study in American-Jewish Popular Culture," *American Quarterly,* Vol. 5, 1953, pp. 213-218.

5. Review Article: "The Negro and the Schools," *Northwestern University Law Review,* Vol. 50, 1955, pp. 124-130.

6. "The Sociology of New Towns," *Sociology and Social Research,* Vol. 40, 1956, pp. 231-239.

•7. "Planning, Institutional Policy and User Behavior: The Public Library, A Case Study," prepared for the 1956 meeting of the Institute of Social Research, University of Chicago.

8. "American Jewry: Present and Future," and "The Future of American Jewry," (two-part article), Commentary, Vol. 21, May and June 1956, pp. 422-430, 555-563.

9. "The Creator-Audience Relationship in the Mass Media: An Analysis of Movie Making," in B. Rosenberg and D. White, *Mass Culture: The Popular Arts in America,* Free Press, 1957, pp. 315-324.

10. "The Progress of a Suburban Jewish Community," *Commentary,* Vol. 22, February 1957, pp. 113-122. Reprinted in Bobbs-Merrill Reprint Series in The Social Sciences, #396.

•11. "The Goal-Oriented Approach to Planning," prepared for the Puerto Rico Planning Society and Puerto Economic Association, February 1958.

•12. "Social Planning," prepared for the Puerto Rico Central Planning Board, March 1958. Reprinted in *Bauwelt* (Germany) No. 51-52, December 1969, pp. 252-256.

13. "The Origin and Growth of a Jewish Community in the Suburbs: A Study of the Jews of Park Forest," in M. Sklare, *The Jews: Social Patterns of an American Group,* Free Press, 1958, pp. 205-248.

14. "Popular Culture and Its High Culture Critics," *Dissent,* Vol. 5, 1958, pp. 185-187.

15. "Informal Sociology: A Proposal for a New Publication," *American Sociological Review,* Vol. 23, 1958, pp. 441-442.

•16. "Physical Environment, Human Behavior and Their Relationships," (published as "The Potential Environment and the Effective Environment"), prepared for an NIMH Seminar on Determinants of Mental Health, September 1958.

17. Review Article: "The Loneliness of Man in Modern American Society," *Kyklos* (International Review for Social Sciences, (Basel), Vol. 13, 1959, pp. 102-105.

•18. "The Human Implications of Current Redevelopment and Relocation Planning," *Journal of the*

American Institute of Planners, Vol. 25, 1959, pp. 15-25. Updated version reprinted as "An Evaluation of the Redevelopment Plan and Process," in W. Wheaton, G. Milgram, M. Meyerson, *Urban Housing,* Free Press, 1967, pp. 458-474.

•19. "Diversity and Homogeneity in American Life," (published as "Diversity is Not Dead: A Report on Our Widening Range of Choice"), *The New Republic,* Vol. 144, April 3, 1961, pp. 11-15. Reprinted in P. Ehrensaft, *Sociological Anatomy of America,* Macmillan, 1969.

•20. "The Effect of a Community Upon Its Residents," prepared for the Urban Sociology Colloquium, Rutgers University, May 1961.

•21. "Planning and Social Life: An Evaluation of Friendship and Neighbor Relations in Suburban Communities," *Journal of the American Institute of Planners,* Vol. 27, May 1961, pp. 134-140. Reprinted in R. Gutman and D. Popenoe, *Neighborhood, City and Metropolis,* Random House, 1970, pp. 746-755; H. Proshansky, *et al.,* eds., *Environmental Psychology,* Holt, Rinehart and Winston, 1970, pp. 501-509; G. Lindberg, ed., *Urbana Processer, Glerup* (Sweden), 1972, pp. 225-236..

•22. "The Balanced Community: An Evaluation of Homogeneity and Heterogeneity in Residential Areas," *Journal of the American Institute of Planners,* Vol. 27, August 1961, pp. 176-184. Excerpted in *Current,* November 1961, pp. 32-36; in *Ekistics,* Vol. 13, 1962, pp. 57-59. Reprinted in L. Balbo and G. Martinotti, *Metropoli e Sottocomunita,* Marsilio (Italy), pp. 75-94; G. Lindberg, *Urbana Processor, Glerup* (Sweden), 1972, pp. 236-251.

23. "'Communitas': Its Impact on City Planning," *Dissent,* Vol. 8, 1961, pp. 326-332.

24. "Pluralist Esthetics and Subcultural Programming: A Proposal for Cultural Democracy in the Mass Media," *Studies in Public Communications,* No. 3, Summer 1961, pp. 27-35.

25. "Planners and Suburbs," *Landscape,* Vol. II, 1961, pp. 27-35.

•26. "Urbanism and Suburbanism as Ways of Life: A Re-evaluation of Definitions," in A. Rose, *Human Behavior and Social Processes,* Houghton-Mifflin, 1962, pp. 625-648. Reprinted in Peter Rose, *Study of Society,* Random House, 1967, pp. 306-322; R. Pahl, *Readings in Urban Sociology,* Pergamon Press (London), 1968, pp. 95-118; S. Fava, *Urbanism in World Perspective,* Crowell, 1968, pp. 63-81; A. Callow, *American Urban History,* Oxford University Press, 1969, pp. 504-518; and 1972, pp. 507-521; R. Gutman and D. Popenoe, *Neighborhood, City and Metropolis,* Random House, 1970, pp. 70-84; A. Cousins and H. Nagpaul, *Urban Man and Society,* Knopf, 1970, pp. 157-164; J. Kramer, ed., *North American Suburbs,* Glendessary, 1972, pp. 31-50; J. Richardson, ed., *The American City,* Xerox, 1972, pp. 389-407; J. Palen and K. Flaming, *Urban America,* Holt, Rinehart and Winston, 1972, pp. 184-201.

27. Review Article: "The Split Level Trap," in *Journal of the American Institute of Planners,* Vol. 28, February 1962, pp. 47-49.

•28. "City Planning and Urban Realities," *Commentary,* Vol. 33, February 1962, pp. 170-175. Excerpted in *Current,* March 1962, pp. 21-22. Re-

printed in M. Freedman and P. Davis, eds., *Contemporary Controversy,* Scribner's, 1966, pp. 368-377.

29. "Hollywood Films on British Screens: An Analysis of the Functions of American Popular Culture Abroad," *Social Problems,* Vol. 9, 1962, pp. 324-328.

•30. "Outdoor Recreation and Mental Health," in Outdoor Recreation Resources Review Commission, *Trends in American Living and Outdoor Recreation,* U.S. Government Printing Office, ORRRC Study Report No. 22, 1962, pp. 234-242.

31. "The Mass Media in the Life of a Working Class Audience," *Comment,* Vol. 3, 1962, pp. 16-19. (Adapted from *The Urban Villagers.*)

32. "Planning and Power," *Commentary,* Vol. 34, February 1963, pp. 176-179.

•33. "Social and Physical Planning for the Elimination of Urban Poverty," *Washington University Law Quarterly,* February 1963, pp. 2-18 and in American Institute of Planners, *Proceedings of the 1962 Annual Conference,* AIP, 1963, pp. 176-190. Reprinted in B. Rosenberg, I. Gerver and W. Howton, *Mass Society in Crisis,* Macmillan, 1964, pp. 629-644; D. Mandelker, *Managing Our Urban Environment,* Bobbs Merrill, 1966, pp. 449-456; B. Frieden and R. Morris, *Urban Planning and Social Policy,* Basic Books, 1968, pp. 39-54; R. Kramer and H. Specht, *Readings in Community Organization Practice,* Prentice Hall, 1969, pp. 425-437.

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Shelter Allowance Schedules, Defendants' Exhibit "B".

The following districts have filed as their locally established schedule, the Maximum Monthly Shelter Allowances by Family Size set forth in the attached:

effective 1974

Dutchess	4/1
Niagara	4/1
Suffolk	4/1
Sullivan	4/1
Chenango	4/1
Tompkins	4/1
Ulster	4/1
Essex	3/1
Orange	4/1
Albany	4/3
Wayne	4/10
Chautauqua	4/9
Monroe	4/1
Erie	6/1
Cattaraugus	4/1

Maximum Shelter Allowances Without Heat.

(See opposite page ☞)

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LOCAL AGENCY MAXIMUM MONTHLY SHELTER ALLOWANCES WITHOUT HEAT BY FAMILY SIZE

	1	2	3	4	5	6	7	8+
Albany	126	151	153	153	153	153	153	153
Allegany	88	106	100	106	106	106	106	106
Broome	101	121	136	136	136	136	150	150
Cattaraugus	69	84	93	93	93	93	93	93
Cayuga	78	94	94	100	106	114	114	114
Chautauqua	75	90	90	96	96	100	107	157
Chemung	74	87	91	94	101	113	120	120
Chenango	68	83	98	98	108	108	108	121
Clinton	58	71	78	88	92	92	93	93
Columbia	108	130	130	132	132	132	132	132
Cortland	87	105	105	139	151	151	151	161
Delaware	78	95	97	97	97	97	97	102
Dutchess	113	136	143	145	155	155	155	155
Erie	113	135	135	135	137	137	137	137
Essex	74	90	90	90	90	90	90	91
Franklin	60	73	73	80	80	80	80	80
Fulton	78	91	94	97	97	97	97	97
Genesee	97	116	116	116	116	116	116	171
Greene	88	106	108	110	110	110	110	110
Hamilton	56	70	78	79	89	97	103	113
Herkimer	122	147	147	147	147	147	147	147
Jefferson	56	70	78	79	89	97	103	113
Lewis	70	85	86	88	93	95	110	111
Livingston	77	93	93	93	93	93	93	93
Madison	105	127	127	127	127	127	127	127
Monroe	120	144	152	156	157	159	162	176
Montgomery	76	92	92	92	92	92	92	127
Nassau	129	154	215	245	271	285	333	355
New York City	117	140	160	164	174	209	261	261
Niagara	91	109	114	115	124	126	165	165
Oneida	76	93	95	101	107	118	130	130
Onondaga	106	127	127	127	139	159	159	159
Ontario	106	128	128	150	131	131	131	131
Orange	115	138	145	146	154	154	154	154
Orleans	79	96	101	101	101	101	101	101
Oswego	66	81	97	97	107	107	112	112
Otsego	96	116	116	116	116	116	116	125
Putnam	118	141	146	162	162	208	208	209
Rensselaer	84	102	102	102	102	102	102	121
Rockland	145	173	217	231	267	311	340	340
St. Lawrence	83	101	102	109	109	110	110	110
Saratoga	104	125	134	141	148	148	148	148
Schenectady	92	111	113	114	125	146	146	155
Schoharie	96	116	116	116	116	116	116	125
Schuyler	105	127	127	127	127	127	127	127
Seneca	75	90	90	96	96	100	107	157
Steuben	79	95	115	115	115	116	116	132
Suffolk	186	221	233	258	267	273	275	300
Sullivan	120	144	161	169	183	204	204	204
Tioga	67	82	95	95	95	95	99	99
Tompkins	108	130	137	141	146	163	163	184
Ulster	109	134	135	140	142	158	158	159
Warren	70	85	86	88	93	95	110	111
Washington	80	97	97	98	105	106	106	114
Wayne	96	116	116	116	116	116	116	116
Westchester	155	185	226	232	287	287	343	400
Wyoming	70	85	86	88	93	95	110	111
Yates	60	73	73	80	80	80	80	80

Maximum Shelter Allowances With Heat.

(See opposite page ☞)

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LOCAL AGENCY MAXIMUM MONTHLY SHELTER ALLOWANCES WITH HEAT BY FAMILY SIZE

	1	2	3	4	5	6	7	8+
Albany	143	168	173	180	181	182	185	186
Allegany	108	134	142	150	153	155	158	161
Broome	121	149	172	180	183	185	202	205
Cattaraugus	89	112	129	137	140	142	145	148
Cayuga	96	119	126	140	149	159	162	165
Chautauqua	88	103	104	112	113	119	126	177
Chemung	92	112	123	134	144	158	168	171
Chenango	88	111	134	142	155	157	160	170
Clinton	78	99	114	132	139	141	145	148
Columbia	126	155	162	172	175	177	180	185
Cortland	107	133	141	[illegible]	[illegible]	[illegible]	[illegible]	216
Delaware	93	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	157
[illegible]	[illegible]	161	175	[illegible]	198	200	203	206
Erie	128	119	152	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Fulton	93	122	130	141	144	146	149	152
Genesee	115	141	148	156	159	161	164	222
Greene	106	131	140	150	153	155	158	164
Hamilton	79	104	118	133	146	157	164	180
Herkimer	142	175	183	191	194	196	199	202
Jefferson	76	98	114	123	136	146	155	168
Lewis	90	113	122	132	140	144	162	166
Livingston	95	118	125	133	136	138	141	144
Madison	125	155	163	171	174	176	179	182
Monroe	136	160	174	184	187	190	196	212
Montgomery	96	120	128	136	139	141	144	182
Nassau	144	175	241	278	306	322	372	397
New York City	132	159	181	190	205	242	296	297
Niagara	104	122	130	135	146	149	190	192
Oneida	96	121	131	145	154	167	182	185
Onondaga	124	152	159	167	182	204	207	210
Ontario	124	153	160	170	174	176	179	182
Orange	133	163	177	186	197	199	202	205
Orleans	97	121	133	141	144	146	149	152
Oswego	84	106	129	137	150	152	160	163
Otsego	116	144	152	160	163	165	168	180
Putnam	136	186	178	202	205	253	256	260
Rensselaer	101	119	122	129	130	131	134	154
Rockland	160	194	243	264	302	348	379	382
St. Lawrence	103	129	138	153	156	159	162	165
Saratoga	124	153	170	185	195	197	200	203
Schenectady	109	128	133	141	153	175	178	188
Schoharie	116	144	152	160	163	165	168	180
Schuyler	123	152	159	167	170	172	175	178
Seneca	93	115	122	136	139	145	155	208
Steuben	99	123	151	159	162	165	168	187
Suffolk	201	242	259	291	302	310	314	312
Sullivan	140	172	197	213	230	253	256	259
Tioga	87	110	131	139	142	144	151	154
Tompkins	126	155	169	181	189	208	211	235
Ulster	127	156	167	180	185	203	206	210
Warren	90	113	122	130	140	144	162	166
Washington	98	122	129	138	148	151	154	165
Wayne	114	141	148	156	159	161	164	167
Westchester	170	206	252	265	322	324	387	342
Wyoming	90	113	122	132	140	144	162	166
Yates	78	96	105	120	123	125	128	131

Shelter Allowance Schedules.

RENT SCHEDULE

MONTHLY

ALLEGANY COUNTY DEPARTMENT OF SOCIAL SERVICES

EFFECTIVE MAY 3, 1972

	Unfurnished W.O. Heat	*Furnished W.O. Heat*	*Unfurnished with Heat*	*Furnished with Heat*
1-2 Rooms	50	55	60	75
3-4 Rooms	55	60	65	80
5-6 Rooms	70	80	95	110
7-8 Rooms	80	85	95	120
9-10 Rooms	85	90	95	120

Requests for rent in excess of this schedule will be maintained in a file by the case supervisor, and will require the approval of the Commissioner and the case supervisor.

Shelter Allowance Schedules.

BROOME COUNTY DEPARTMENT OF SOCIAL SERVICES
MAXIMUM SHELTER ALLOWANCE EFFECTIVE *8-1-70.*
AMENDMENT EFFECTIVE *12-1-74.*

	Rent Only	*Rent & Heat*	*With Furniture*
1 Single housekeeping room	$ 15.00 week $ 65.00 month		
2 rooms & bath	$ 70.00	$ 85.00	$100.00
3 rooms & bath	$ 90.00	$107.00	$130.00
4 rooms & bath	$105.00	$125.00	$155.00
5 rooms & bath	$115.00	$138.00	$175.00
6 rooms & bath	$120.00	$147.00	$190.00

Rents in excess will be paid up to 30 days on new applications.

After 30 days, if client has not relocated, only the maximum in the above schedule will be budgeted.

Shelter Allowance Schedules.

COUNTY OF CAYUGA
DEPARTMENT OF SOCIAL SERVICES

RECOMMENDED 1973 RENT SCHEDULE

Recommended Maximum Allowance for Rent =
$70.00 (base allowance) + $15.00 required bedroom + appropriate amount for family size based on 12 month fuel allowance (if heat and utilities are included) up to maximum of 10 persons.

No. of Persons in Family	*Adults/ Children*	*Without Heat*	*With Heat*
1	1/0	$ 85.00	$100.00
2	2/0	$ 85.00	$100.00
	1/1	$100.00	$115.00
3	2/1	$100.00	$117.00
	1/2	$100.00	$117.00
4	2/2	$100.00	$117.00
	1/3	$115.00	$132.00
5	2/3	$115.00	$135.00
	1/4	$115.00	$135.00
6	2/4	$115.00	$135.00
	1/5	$130.00	$150.00
7	2/5	$130.00	$153.00
	1/6	$130.00	$153.00
8	2/6	$130.00	$153.00
	1/7	$145.00	$168.00
9	2/7	$145.00	$171.00
	1/8	$145.00	$171.00
10	2/8	$145.00	$171.00
	1/9	$160.00	$186.00

Shelter Allowance Schedules.

CHEMUNG COUNTY
DEPARTMENT OF SOCIAL SERVICES

OFFICE PROCEDURE No. AA-3
November 13, 1972

SUBJECT: RENTAL POLICY AND ALLOWANCES

I. GENERAL POLICY:

A. The schedule of rental allowances outlined below becomes effective November 13, 1972.

B. Rental allowances are based on the number of bedrooms needed to accommodate a given family group. Consideration should be given to age and sex, as well as to the need for reasonable privacy.

C. The schedule reflects *maximum* allowances, and should not be considered as a standard.

D. Allowance will not usually be made for payment of rent prior to the date of application for public assistance. See Bulletin No. 134 for exceptions.

II. MAXIMUM RENTAL ALLOWANCES:

SINGLE PERSON IN ROOMING HOUSE FACILITY:
($18.00 per week *including* heat and utilities)

1-BEDROOM ARRANGEMENTS FOR 1 OR 2 PERSONS:
($24.00 per week *including* heat and utilities)

2, 3, 4 persons
2 BEDROOMS: $80.00 per month *Not Including* Heat

5, 6
3 BEDROOMS: $110.00 " " " " "

7+
4 BEDROOMS: $120.00 " " " " "

DEPARTMENT OF SOCIAL SERVICES
CHEMUNG COUNTY
WILLIAM A. LIDDLE
William A. Liddle
Commissioner

Shelter Allowance Schedules.

RENT ALLOMANCE SCHEDULE
CLINTON COUNTY
(Revised 1/1/71)

Apartments two or more rooms:

Family of 3 or more:	Unfurnished	Unheated	$80.00
	Furnished	Unheated	85.00
One or Two persons:	Unfurnished	Unheated	65.00
	Furnished	Unheated	70.00
Single Rooms:	Furnished	Unheated No cooking privileges	50.00
	Furnished	Unheated Cooking priv.	55.00

When no bathroom facilities are in rental house, a maximum of $45.00 shall be allowed.

When heat is furnished, and standard allowance for heating unless the resulting combination is more than rent paid. In that case, use amount as paid.

Exceptions will be made by Commissioner in event it is deemed necessary for social or economic reasons.

Shelter Allowance Schedules.

CLINTON

Apartments two or more rooms:

Family of 3 or more	Unfurnished	Unheated	80.00
	Furnished	Unheated	85.00
One or two persons	Unfurnished	Unheated	$65.00
	Furnished	Unheated	70.00
Single Rooms	Furnished	Unheated No cooking privileges	50.00
	Furnished	Unheated Cooking priv.	55.00

When no bathroom facilities are in rental house, a maximum of $45.00 shall be allowed.

When heat is furnished, add standard allowance for heating unless the resulting combination is more than rent paid. In that case, use amount as paid.

Exceptions will be made by Commissioner in event it is deemed necessary for social or economic reasons.

The schedules were based on a review of the case records showing what was being included in grants and also on the experiences of those living in county with what was generally being charged for rental units. The agency has found that breaking the schedule down with the "three or more family" being one group and one or two persons another works well for them. The inclusion of furnishing is shown when heat is included, the maximum is equal to rent plus heating allowance.

The agency does make exceptions to the maximums shown on schedule. The case is reviewed before an exception is made and exceptions are usually done on a temporary basis pending finding housing within the maximum. The reasons for granting an exception are strong social and physical need and absolute impossibility of finding housing within the maximum. Exceptions are made by the Commissioner. At the present time, no one has asked for more than the maximum. The agency does not believe any family is paying more than the maximum.

It is becoming increasingly difficult to find housing in the county. The Air Base and SUNY unit have a tremendous impact on the extent of what is available. Landlords can rent an apartment to 4 college students and collect from each of them what he would receive from the client. Large families find it very difficult to find housing of adequate quality.

Many Public Assistance families live in single family houses. The majority do not have central heating and some do not have inside plumbing. Generally the quality is not bad considering what is available in the county. There is a Building Inspector in the City of Plattsburg and a County Health Department who will come in and make judgments concerning the quality of the housing as it is related to the safety and health of dwellers.

(Illegible paragraph.)

COLUMBIA

From: 1/1/68—the maximum rent was $90.00
Rent Schedule 6/69 to present

Usually allowed as paid, not to exceed $90.00 monthly and $120.00 wth heat. In usual circumstances if rental exceeds this amount and no substitute can be obtained, approval from Commissioner and/or Deputy must be given until other rental can be secured.

This schedule was based on the rents which clients were paying according to case records. No consideration was given to the question of furnished versus not-furnished. This has not been a problem. There is no breakdown according to family size.

Exceptions are made according to the above method in some cases where justified by an evaluation of the situation. Such exceptions are only temporary. At the present time there are less than 10 cases where the rent being paid is greater than that being included in the grant. Exceptions have not been granted in these cases, since the agency does not think the rent is necessary in the situation.

There is a housing shortage in the county and is particularly acute in the City of Hudson for all sized families. Here Urban Renewal has razed a number of houses which were in very poor condition. Other housing was purchased by the Urban Renewal Agency to house those displaced. At the present time there are 60 units under Urban Renewal and 25 units of Public Housing. The removal of rental units due to destruction created a situation where landlords are able to get high rents for poor quality housing and are not receptive to the needs of their tenants. The most frequent complaint is the lack of attention given to places for repair of plumbing.

The County Health Department and the City of Hudson Building Inspector will make judgments regarding the quality of the housing. The very poorest quality housing has been removed now. If the proposed plans for public housing are completed, landlords will no longer have the control that they presently hold.

The agency has no families in motels.

CORTLAND

November 1, 1974

Donald L. Lamont, Commissioner
Cortland County Department
of Social Services
133 Homer Avenue
Cortland, New York 13045

Dear Commissioner Lamont

This is in response to your letter of October 15, 1974 and your telephone conversation with a member of my staff concerning Cortland County's rental allowance policy.

Please be advised that, effective October 1, 1974, rental allowance policy for Cortland County, filed with this Department pursuant to Department Regulation Section 352.3(a), is as follows:

Number of Persons	1	2	3	4	5	6	7	8
Without Heat	$105	120	130	140	150	155	155	160
With Heat	$125	148	166	184	198	200	200	210

Sincerely,

/s/ 11/3
Thomas H. Kilcoyne

LM:THK:sd

Shelter Allowance Schedules.

DELAWARE

Rent Schedule 11/14/67 to 12/31/70

	Minimum	*Maximum*
Rent only	$25	$70
Rent with Fuel	30	80
Rent with Fuel & Utilities	35	90

Rent Schedule 1/1/71 to present

Without heat	Maximum	$70
With heat	Maximum	$90

The rent schedule was determined by a review of rents paid as shown in case records. In addition, the Commissioner also visited the Housing Project in Sidney where he discussed the cost of rentals with them.

There is no differential for families of different sizes. Furnished apartments are not readily available. Those furnished apartments have been rented within the maximum.

At the present time no exceptions are being made. In a very rare instance with very large families, an exception has been made. The Commissioner is the one who would make the decision. The agency estimates that less than 10% of the caseload is paying rents in excess of the maximum and is taking the amount from other items. The agency recommends families move into housing within their maximum.

The population in Delaware County has shifted and caused pressure on rent levels in two areas of the county—Gilboa and Delhi. These two areas have higher rents than the balance of the county and do not have a great deal of housing available. Housing is generally available in the

Shelter Allowance Schedules.

outlaying areas. Large families find it difficult to find housing.

The housing project in Sidney was originally a federal project but is now locally operated. Rents range from $50 to $110. There are usually some vacancies available. There are no other housing projects in the County.

There is a large number of substandard dwellings in the county, occupied by many Non-Public Assistance families as well as Public Assistance families. Delaware County is officially a part of Appalachia and has a poor economic base. The economic status is reflected in the housing where central heating is the exception rather than the rule and plumbing is crude in many homes.

Shelter Allowance Schedules.

FRANKLIN

Rent Schedule

1) unheated

number of rooms	unfurnished maximum allowance	furnished maximum allowance
1 & 2	$45.00 mo.	$50.00 mo.
3	$50.00 mo.	$55.00 mo.
4	$60.00 mo.	$65.00 mo.
5	$70.00 mo.	$75.00 mo.
6	$80.00 mo.	$85.00 mo.

Provision allowed for the Commissioner to make exception to the above, where social or economical conditions of the family requires such.

2) Heated apartments: In heated apartments the rental allowance shall be listed as above in item (1) plus annual fuel allowance on monthly basis.

Shelter Allowance Schedules.

FULTON

Rent schedule August 12, 1970

Revised retroactive to 7/1/70

TYPE OF DWELLING	MAXIMUM RENT
Unfurnished flats or apartments up to 4 bedrooms	$ 85.00
Unfurnished *heated* flats or apartments up to 4 bedrooms	$110.00
Furnished and *heated* flats or apartments up to 4 bedrooms	$120.00
Whole house—unheated and unfurnished	$100.00

Exceptions will be made for family dwellings exceeding four bedrooms.

WILLIAM A. MORRIS
Commissioner of Social Services
Fulton Co. Dept. Social Services

Shelter Allowance Schedules.

COUNTY OF GENESEE
DEPARTMENT OF SOCIAL SERVICES
Beverly J. Crabb, Commissioner
3837 West Main Road
Batavia, New York 14020
Phone: 343-8786

March 12, 1973

Mr. Gabriel S. Russo, Deputy Commissioner
Income Maintenance
N. Y. State Dept. of Social Services
1450 Western Avenue
Albany, N. Y. 12203

Dear Mr. Russo:

As stated on the inclosed form, this Department's first rent schedule was established July 1, 1970.

Rent is paid according to need to the maximum of $110.00 per month. Exceptions are made in situations which might otherwise result in eviction or where a large family is involved.

Very truly yours,

(Miss) Beverly J. Crabb
Commissioner

CM:h

CAROL D. MERRILL
(Mrs.) Carol D. Merrill
Case Supvr.

Shelter Allowance Schedules.

STELLA CANNIFF
Commissioner

RUTH L. YOUMANS
Deputy Commissioner

Greene County

DEPARTMENT OF SOCIAL SERVICES

Catskill, New York 12414

Telephone 943-3200

Effective May 1, 1973 we are changing our rent schedule as follows:

1-3 persons unheated	$ 90.00
1-3 persons heated	100.00
4-6 persons unheated	100.00
4-6 persons heated	110.00
7+ persons unheated	110.00
7+ persons heated	120.00

HAMILTON

Rent schedule effective in 1967 to the present.

"As paid up to maximum of $85.00 per month for unfurnished and up to $90.00 per month for furnished."

The method used in determining this rate is not known due to staff changes in this agency. At the present time, all rents are less than this maximum. Since the rental units available in this county are usually small houses, the rent does not include heat and utilities. In those few apartments where heat is furnished, the cost is still below the maximum.

There has not been a need to make an exception. If such need occurred, the Caseworker would evaluate the situation and make the decision.

There is a housing shortage within the county. At the present time 10-15% of the families in receipt of Public Assistance are living in poor housing which is inadequate for their needs. There is no agency within the county which has the power to make decisions related to the quality of housing. There is no public housing.

The agency has no families in motels.

HERKIMER

September 24, 1974

Michael J. Bush, Commissioner
Herkimer County Department of
Social Services
Box 231
Herkimer, New York 13350

Dear Commissioner Bush:

Deputy Commissioner Maher has asked me to acknowledge your letter of September 10, 1974.

Please be advised that the rent allowance schedule for Herkimer County, effective July 1, 1974, filed with this Department pursuant to Department Regulation Section 352.3(a), is as follows:

Number of persons	*1*	*2*	*3*	*4*	*5*	*6*	*7*	*8*
Unheated		70	70	75	80	90	100	110
Heated		98	106	119	127	139	152	165

Your continuing cooperation is appreciated.

Sincerely,

/s/ 9/26
THOMAS H. KILCOYNE

LH:THK:sd

Shelter Allowance Schedules.

JEFFERSON

Revised 2/1/71

Maximum rents to be paid by Jefferson County Social Services Department per month to Private Owners*

No. of Tenants	*1 or 2*	*3 or 4*	*5*	*6*	*7 or more*
Furnished					
With Heat	85	90	100	105	140
Without Heat	70	75	85	90	110
Unfurnished					
With Heat	80	85	95	100	125
Without Heat	65	70	75	85	100

(Illegible Signature)
Commissioner

* Rates depend on location, condition of property, assessed valuation and costs to other inhabitants of same building with comparable facilities.

Shelter Allowance Schedules.

LEWIS COUNTY
DEPARTMENT OF SOCIAL SERVICES
Lowville, New York
13367

BERYL W. FREEMAN
Commissioner
Telephone 376-3536

HAZEL J. BUSH
Administrative Assistant
LOUISE RAMOS
Case Supervisor, C. W.

LORENA BERNHOLZ
Case Supervisor, P. A.
ELLA GORDON
Case Supervisor, P. A.

May 28, 1971

Mr. C. Walter Driscoll, Area Director
State Department of Social Services
333 East Washington Street
Syracuse, New York 13202

Attention: Mary A. Milazzo, Senior Home Economist

Dear Mr. Driscoll:

In reply to your letter of May 25, 1971 concerning Monthly Allowance Schedule of Rent, we offer the following information.

Effective January 1, 1967, the Allowance Schedule for Rent used in this Agency ranged from $25.00 per month to $80.00 per month. Consideration was given to adequacy, including number of rooms for the size of the family, whether heat and utilities were included and whether furnished or unfurnished.

Shelter Allowance Schedules.

Subsequent to January 1, 1969, a change was made which became effective on September 1, 1969 increasing the maximum rent allowed to $90.00 per month. Other considerations remained the same as previously stated in paragraph two above.

Effective January 1, 1971 the Rent Schedule was revised to the following:

Maximum Rent Schedule

	2 or 3 Rooms and Bath	*4 or 5 Rooms and Bath*	*6 or more Rooms and Bath*
Without heat or utilities	$65	$80	$90
With heat and hot water	$72	$85	$100
With utilities, heat, and hot water	$80	$90	$108

Lewis County has no housing authority. The Agency based the Schedule on the average amount of rent being paid in various localities throughout the county, using remote rural sections, more favorable rural areas, and villages as the basis for this determination. No provisions for exceptions to the present schedule are provided. Only in a very rare circumstance would an exception be considered.

Very truly yours,

BERYL W. FREEMAN
Beryl W. Freeman, Commissioner

BWF/hjb

Shelter Allowance Schedules.

Sub: Rent Schedules DSS LIVINGSTON

DATE: 5/25/71

Person(s) Contacted:

(1) Director of Services

(2) Commissioner

(3) Accounting Supervisor

I. 1. Rate established prior to 1/1/69:
$65.00/month without heat
85.00/month with heat

2. Date established: 1/1/68

II. 1. Changes in rate schedules since 1/1/69:

Changes	*Effective Date*
(100.00/month with heat (85.00/month without heat	8/1/69
100.00/month with heat (Rate used for all new cases opened since reorganization of agency) separation as of 2/8/71	2/8/71—Current

Shelter Allowance Schedules.

Fuel					
Persons	*1,2*	*3,4*	*5,6*	*7,8*	*9,10*
8 mo. Oct.-May	24.80	27.40	32.60	37.80	48.00

MADISION COUNTY DEPARTMENT OF SOCIAL SERVICES
WAMPSVILLE, N. Y. 13163

RENT SCHEDULES FOR MADISON COUNTY EFFECTIVE
JULY 1, 1972

FAMILY SIZE	SIZE OF HOUSE	MAXIMUM RENT
1-2 persons	3-6 rooms, bare	$ 75.00 monthly
" "	" " , heat included	95.00 "
" "	" " , heat & lights incl.	105.00 "
" "	" " , furnished	130.00 "
3-5 persons	6-9 rooms, bare	95.00 "
" "	" " , heat included	120.00 "
" "	" " , heat & lights incl.	130.00 "
" "	" " , furnished	145.00 "
6 or more	7-10 rooms, bare	110.00 "
" " "	" " , heat included	130.00 "
" " "	" " , heat & lights incl.	145.00 "

WILLIAM LIDDLE
William Liddle, Commissioner

Shelter Allowance Schedules.

MONTGOMERY

Rent Schedule 4/1/68-6/30/69

Furnished apartment or flat with heat — Up to $100.00 per month

Furnished apartment or flat without heat — Up to $75.00 per month

Unfurnished apartment or flat with heat — Up to $80.00 per month

Unfurnished apartment or flat without heat — Up to $60.00 per month

Note: The Commissioner of Social Services may at his discretion alter these rates in an unusual case or in an emergency at any time to pay a higher rate when necessary.

Rent Schedule 7/1/69 to present

Furnished apartment or flats with heat — Up to $120.00 per month

Furnished apartment or flat without heat — Up to $90.00 per month

Unfurnished apartment or flat with heat — Up to $100.00 per month

Unfurnished apartment or flat without heat — Up to $80.00 per month

Public Housing—An allowance will be made in these instances in conformity with Bulletin #134, c (a), (b), (iv), page #8.

Rents in Montgomery County remained very low until 1968 when Urban Renewal was started in Amsterdam. At this time rates began to rise due to demolition. The rent schedules were developed by reviewing the rents as paid

to the client. The agency is not making exceptions to the schedule at the present time. In the past the only exceptions have been made with very large families (Example—15 persons). Such exceptions are made by the Commissioner. At the present time the agency does have several cases where the families are paying more rent than the maximum. The agency does not feel it is necessary for them to live there and does not make an exception. An example would be a 3 person family living in an apartment costing $135.00 when there are other apartments of sufficient size for the family within the maximum.

The allowance schedule for rent does not include utilities since this is in the flat grant. Heat and furnishings are differentiated in the schedules. The size of the family is not considered unless the family is very large.

There are two public housing projects in the city of Amsterdam—one for age 62 and up with 1 and 2 bedrooms which accommodate 75-100 people and the other for low income families with 68 units ranging from 2-5 bedrooms. The agency has had a great deal of trouble with the low income project, especially with one case. Prior to the opening of the project two years ago, a client with ten children made application for a five bedroom apartment. She has never been accepted into the project, although other people have gotten five bedroom apartments.

NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES
County Seat Drive
Mineola, L.I., N.Y.

MAXIMUM SHELTER SCHEDULE

Rent allowances shall not exceed this schedule.

Furnished Rooms

Furnished accommodations shall provide essential furniture and household equipment for daily living.

No. of Persons	*No. of Rooms*	*Inclusive Items*	*Rent Allowance*
1	1	Heat, Hot water, utilities	$110
2	1 double	"	125

Apartments and Houses

		With Heat	*Without Heat*
1–2	2–4	$145	$135
3	3–4	165	150
4	3–5	180	165
5–6	4–6	195	180
7–8	6–8	210	190
9	6–8	220	200

Add $25.00 a month for each additional person.

Hotel/Motel Accommodations

Payment for hotel or motel accommodations may be provided if approved only while other housing is unavailable. Minimum hotel/motel rates shall be paid in accordance with available facilities.

Effective 7/1/70 to present.

(See opposite ☞)

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ITEM NO.	TYPE OF ALLOWANCE OR SERVICE	N.Y.C. CENTER AUTHORIZATION	REQUIRED CONSULTANT RECOMMENDATION
38.	Security Deposit		
	a. Payment required by a prospective private landlord	Income Maint. Supvr.	Housing Specialist
	b. Payment required by N.Y.C. Housing Authority	Income Maint. Supvr.	____
	c. Payment required by Utility Company (assignment required)	Income Maint. Supvr.	____
39.	Shelter - Allowance for		
	a. Private Housing		
	NOTE: Authorization of rent is limited to two issues, if in controlled housing, pending return of W-640a.		
	(1) Unfurnished Self-Contained Units* (Controlled and Decontrolled with Central Heating)		
	1 person		
	RENT (Heat and Hot Water Included)		
	Up to $100.00 monthly	Income Maint. Supvr.	____
	$100.01 - $120.00 monthly	Assistant Office Mgr.	____
	$120.01 - $150.00 monthly	Sr. Asst. Office Mgr.	____
	2 or 3 persons		
	RENT (Heat and Hot Water Included)		
	Up to $125.00 monthly	Income Maint. Supvr.	____
	$125.01 - $140.00 monthly	Assistant Office Mgr.	____
	$140.01 - $180.00 monthly	Sr. Asst. Office Mgr.	____
	4 or 5 persons		
	RENT (Heat and Hot Water Included)		
	Up to $130.00 monthly	Income Maint. Supvr.	____
	$130.01 - $150.00 monthly	Assistant Office Mgr.	____
	$150.01 - $210.00 monthly	Sr. Asst. Office Mgr.	____

*Self-Contained Unit is one where family has a private kitchen and private toilet facilities.

(See opposite ☞)

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NO.	TYPE OF ALLOWANCE OR SERVICE	CENTER AUTHORIZATION	REQUIRED CONSULTANT RECOMMENDATION

39. Shelter - Allowance for (cont'd)

6 persons

RENT (Heat and Hot Water Included)

Up to $135.00 monthly	Income Maint. Supvr.	_____
$135.01 - $155.00 monthly	Assistant Office Mgr.	_____
$155.01 - $225.00 monthly	Sr. Asst. Office Mgr.	_____

7 or 8 persons

RENT (Heat and Hot Water Included)

Up to $160.00 monthly	Income Maint. Supvr.	_____
$160.01 - $180.00 monthly	Assistant Office Mgr.	_____
$180.01 - $275.00 monthly	Sr. Asst. Office Mgr.	_____

9 persons and over

RENT (Heat and Hot Water Included)

Up to $175.00 monthly	Income Maint. Supvr.	_____
$175.01 - $200.00 monthly	Assistant Office Mgr.	_____
$200.01 - $300.00 monthly	Sr. Asst. Office Mgr.	_____

NOTE: The adequacy of the living arrangements in terms of the number of rooms and persons in the household should be carefully considered and discussed with Housing Specialist when there is question as to adequacy.

(See opposite ☞)

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NO.	TYPE OF ALLOWANCE OR SERVICE	CENTER AUTHORIZATION	REQUIRED COLLATERAL RECOMMENDATION

39. **Shelter - Allowance for (cont'd)**

Before an apartment in a one- or two-family house, or an entire private house, is acceptable for occupancy, the following data is necessary for discussion with the Housing Specialist.

(1) Is landlord responsible for internal and external repairs?
(2) Is landlord responsible for payment of fuel for heat and hot water?
(3) Is landlord willing to give a lease?
(4) Is landlord responsible for maintenance repairs, and replacement of refrigerator and stove?
(5) Name and address of landlord.

(2) Unfurnished Accommodations
(Controlled and Decontrolled, without Central Heat) practically non-existent - rent plus cost of heat subject to above levels.

(See opposite ☞)

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	TYPE OF ALLOWANCE OR SERVICE	CENTER AUTHORIZATION	REQUIRED CONSULTANT RECOMMENDATION
39.	Shelter - Allowance for (cont'd)		
	(3) Furnished Accommodations (Tax is not to be included in determining level of approval)		
	(Controlled and Decontrolled, with Central Heating)		
	(a) With cooking facilities		
	1 to 3 persons		
	To and including $110.00 monthly	Income Maint. Supvr.	_____
	$110.01 - $135.00 monthly	Assistant Office Mgr.	_____
	$135.01 - $150.00 monthly	Sr. Asst. Office Mgr.	_____
	4 or 5 Persons		
	To and including $130.00 monthly	Income Maint. Supvr.	_____
	$130.01 - $145.00 monthly	Assistant Office Mgr.	_____
	$145.01 - $160.00 monthly	Sr. Asst. Office Mgr.	_____
	6 or more Persons		
	To and including $135.00 monthly	Income Maint. Supvr.	_____
	$135.01 - $150.00 monthly	Assistant Office Mgr.	_____
	$150.01 - $165.00 monthly	Sr. Asst. Office Mgr.	_____

(See opposite ☞)

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TYPE OF ALLOWANCE OR SERVICE	CENTER AUTHORIZATION	REQUIRED CONSULTANT RECOMMENDATION
39. Shelter - Allowance for (cont'd)		
(b) No cooking facilities (prior consultation with Housing Specialist required if client able to prepare own meals).		
1 or more persons (16 years of age and over)		
To and including $90.00 monthly	Income Maint. Supvr.	_____
$90.01 - $105.00 monthly	Assistant Office Mgr.	_____
$105.01 - $130.00 monthly	Sr. Asst. Office Mgr.	_____
b. N.Y.C.H.A. Project*		
Low Cost Housing Projects	Income Maint. Supvr.	_____

*Acceptance of a case in a Housing Project must be accompanied by written notice to the Housing Authority indicating acceptance and the amount of monthly rent.

SS41 ONEIDA

SUBJECT: HOUSING, GENERAL POLICY, INCLUDING REQUIRED ALLOWANCE SCHEDULE FOR RENT
BULLETIN 134, page C-6 "Each Public Welfare Agency shall establish an allowance schedule for rent based on the number of rooms, utilities, furniture—".

PROCEDURE: As of 7-1-71 the following rent schedule is to be in effect.

No. Rooms	1 Basic Rent	2 *Heated* Add per mo.	3 *Furnished* Add per mo.	4 Total Basic and Heat
1	$ 70	$ 0	$ 0	$ 70
2 or 3	70	17	5	87
4 2 br.	75	20	10	95
5 3 br.	85	23	15	108
6 4 br.	95	26	20	121
7 5 br.	105	30	25	135
8 or more	Add 15 for each addl. br.	30	30	—

MJN/gd
6-8-71

POLICY AND PROCEDURE MANUAL

Supersedes C-41-B 1/10/69 — Bulletin C-41-B
Revised 1/25/71 — Effective 3/1/71

AUTHORIZED RENT SCHEDULE
ROOM AND BOARD • SLEEPING ROOMS

ROOM AND BOARD: Includes 3 meals daily . . . 21 per week . . . plus G&E, Heat, and necessary Furnishings, including bed linen, etc.

CLASS I:	Single person . . . has own private room	$ 90.00
CLASS II:	a) Single person . . . shares room with no more than one other person	$ 70.00
	b) Two persons in same room	$ 140.00
CLASS III:	Mother and child . . . have own private room	$ 115.00

SLEEPING ROOMS: Includes G&E, Heat, and necessary Furnishings, including bed linen, etc.

CLASS I:	Single person . . . has own private room and kitchen privileges	$ 52.00
CLASS II:	Single person . . . has own private room but no kitchen privileges	$ 45.00
CLASS III:	Single person . . . shares room with no more than one other person and has kitchen privileges	$ 42.00
CLASS IV:	Single person . . . shares room with no more than one other person but has no kitchen privileges	$ 35.00

NOTE: ALLOWANCE OR PAYMENT OF RENT OR SHELTER IN ANY FORM SHALL NOT . . . FOR ANY REASON WHATEVER . . . EXCEED THE MAXIMUMS ESTABLISHED IN THIS RENT SCHEDULE!

Shelter Allowance Schedules.

ONONDAGA

POLICY AND PROCEDURE MANUAL

Supersedes C-41-B-1/10/69 Revised 1/25/71 — Bulletin C-41-B Effective 3/1/71

AUTHORIZED RENT SCHEDULE
APARTMENTS • FLATS • HOUSES

SIZE: 2 HABITABLE ROOMS • APARTMENT

BASE RENT (does not include G&E, Heat, Furnished)	$ 55.00	$ 55.00
HEAT ONLY INCLUDED .....ADD:	$ 17.00	$ 72.00
FURNISHED ONLY INCLUDED .....ADD:	$ 8.00	$ 63.00
HEAT AND FURNISHED INCLUDED ....ADD:	$ 25.00	$ 80.00

SIZE: 3 HABITABLE ROOMS • APARTMENT

BASE RENT (does not include G&E, Heat, Furnished)	$ 65.00	$ 65.00
HEAT ONLY INCLUDED .....ADD:	$ 17.00	$ 82.00
FURNISHED ONLY INCLUDED .....ADD:	$ 10.00	$ 75.00
HEAT AND FURNISHED INCLUDED ....ADD:	$ 27.00	$ 92.00

NOTES:

1. ALLOWANCE OR PAYMENT OF RENT OR SHELTER IN ANY FORM SHALL NOT . . . FOR ANY REASON WHATEVER . . . EXCEED THE MAXIMUMS ESTABLISHED IN THIS RENT SCHEDULE!
2. WHEN RENT INCLUDES G&E AND HEAT ONLY . . . CASEWORKER SHALL ALLOW OR PAY THE "HEAT ONLY INCLUDED" RENT!
3. SINCE TENANT RECEIVES A G&E ALLOWANCE IN THE PRE-ADD GRANT . . . PAYMENT OF ANY G&E PORTION OF RENT IS THE TENANT'S RESPONSIBILITY!

EXAMPLE: TENANT RENTS 3 ROOM UNFURNISHED APARTMENT WITH G&E AND HEAT INCLUDED IN RENT.

CASEWORKER SHALL ALLOW OR PAY RENT UP TO $82.00 MAXIMUM!

Shelter Allowance Schedules.

SIZES 4 HABITABLE ROOMS • APARTMENT

BASE RENT (does not include G&E, Heat, Furnished)	$ 75.00	$ 75.00
HEAT ONLY INCLUDED .....ADD:	$ 18.80	$ 93.80
FURNISHED ONLY INCLUDED .....ADD:	$ 12.00	$ 87.00
HEAT AND FURNISHED INCLUDED ....ADD:	$ 30.80	$105.80

SIZE: 4 HABITABLE ROOMS • SINGLE FAMILY HOUSE

BASE RENT (does not include G&E, Heat, Furnished)	$ 85.00	$ 85.00
HEAT ONLY INCLUDED .....ADD:	$ 18.80	$103.80
FURNISHED ONLY INCLUDED .....ADD:	$ 12.00	$ 97.00
HEAT AND FURNISHED INCLUDED ....ADD:	$ 30.80	$115.80

NOTES:

1. ALLOWANCE OR PAYMENT OF RENT OR SHELTER IN ANY FORM SHALL NOT . . . FOR ANY REASON WHATEVER . . . EXCEED THE MAXIMUMS ESTABLISHED IN THIS RENT SCHEDULE!
2. WHEN RENT INCLUDES G&E AND HEAT ONLY . . . CASEWORKER SHALL ALLOW OR PAY THE "HEAT INCLUDED ONLY" RENT!
3. SINCE TENANT RECEIVES A G&E ALLOWANCE IN THE PRE-ADD GRANT . . . PAYMENT OF ANY G&E PORTION OF RENT IS THE TENANT'S RESPONSIBILITY!

EXAMPLE: TENANT RENTS 4 ROOM UNFURNISHED FLAT WITH G&E AND HEAT INCLUDED IN RENT.

CASEWORKER SHALL ALLOW OR PAY RENT UP TO $93.80 MAXIMUM!

Shelter Allowance Schedules.

SIZE: 5 HABITABLE ROOMS • FLAT

BASE RENT (does not include G&E, Heat, Furnished)	$ 90.00	$ 90.00
HEAT ONLY INCLUDED .....ADD:	$ 18.80	$108.80
FURNISHED ONLY INCLUDED .....ADD:	$ 14.00	$104.00
HEAT AND FURNISHED INCLUDED ....ADD:	$ 32.80	$122.80

SIZE: 5 HABITABLE ROOMS • SINGLE FAMILY HOUSE

BASE RENT (does not include G&E, Heat, Furnished)	$100.00	$100.00
HEAT ONLY INCLUDED .....ADD:	$ 18.80	$118.80
FURNISHED ONLY INCLUDED .....ADD:	$ 14.00	$114.00
HEAT AND FURNISHED INCLUDED ....ADD:	$ 32.80	$132.80

NOTES: 1. ALLOWANCE OR PAYMENT OF RENT OR SHELTER IN ANY FORM SHALL NOT . . . FOR ANY REASON WHATEVER . . . EXCEED THE MAXIMUMS ESTABLISHED IN THIS RENT SCHEDULE!

2. WHEN RENT INCLUDES G&E AND HEAT ONLY . . . CASEWORKER SHALL ALLOW OR PAY THE "HEAT ONLY INCLUDED" RENT!

3. SINCE TENANT RECEIVES A G&E ALLOWANCE IN THE PRE-ADD GRANT . . . PAYMENT OF ANY G&E PORTION OF RENT IS THE TENANT'S RESPONSIBILITY!

EXAMPLE: TENANT RENTS 5 ROOM UNFURNISHED FLAT WITH G&E AND HEAT INCLUDED IN RENT.

CASEWORKER SHALL ALLOW OR PAY RENT UP TO $108.80 MAXIMUM!

Shelter Allowance Schedules.

SIZE: 6 HABITABLE ROOMS • FLAT

BASE RENT (does not include G&E, Heat, Furnished)	$110.00	$110.00
HEAT ONLY INCLUDED .....ADD:	$ 22.30	$132.30
FURNISHED ONLY INCLUDED .....ADD:	$ 16.00	$126.00
HEAT AND FURNISHED INCLUDED ....ADD:	$ 38.30	$148.30

SIZE: 6 HABITABLE ROOMS • SINGLE FAMILY HOUSE

BASE RENT (does not include G&E, Heat, Furnished)	$120.00	$120.00
HEAT ONLY INCLUDED .....ADD:	$ 22.30	$142.30
FURNISHED ONLY INCLUDED .....ADD:	$ 16.00	$136.00
HEAT AND FURNISHED INCLUDED ....ADD:	$ 38.30	$158.30

NOTES: 1. ALLOWANCE OR PAYMENT OF RENT OR SHELTER IN ANY FORM SHALL NOT . . . FOR ANY REASON WHATEVER . . . EXCEED THE MAXIMUMS ESTABLISHED IN THIS RENT SCHEDULE!

2. WHEN RENT INCLUDES G&E AND HEAT ONLY . . . CASEWORKER SHALL ALLOW OR PAY THE "HEAT ONLY INCLUDED" RENT!

3. SINCE TENANT RECEIVES A G&E ALLOWANCE IN THE PRE-ADD GRANT . . . PAYMENT OF ANY G&E PORTION OF RENT IS THE TENANT'S RESPONSIBILITY!

EXAMPLE: TENANT RENTS A 6 ROOM UNFURNISHED FLAT WITH G&E AND HEAT INCLUDED IN RENT.

CASEWORKER SHALL ALLOW OR PAY RENT UP TO $132.30 MAXIMUM!

Shelter Allowance Schedules.

SIZE: 7 HABITABLE ROOMS • FLAT

BASE RENT (does not include G&E, Heat, Furnished)	$130.00	$130.00
HEAT ONLY INCLUDED .....ADD:	$ 25.80	$155.80
FURNISHED ONLY INCLUDED .....ADD:	$ 18.00	$148.00
HEAT AND FURNISHED INCLUDED ....ADD:	$ 43.80	$173.80

SIZE: 7 HABITABLE ROOMS • SINGLE FAMILY HOUSE

BASE RENT (does not include G&E, Heat, Furnished)	$140.00	$140.00
HEAT ONLY INCLUDED .....ADD:	$ 25.80	$165.80
FURNISHED ONLY INCLUDED .....ADD:	$ 18.00	$158.00
HEAT AND FURNISHED INCLUDED ....ADD:	$ 43.80	$183.80

NOTES: 1. ALLOWANCE OR PAYMENT OF RENT OR SHELTER IN ANY FORM SHALL NOT . . . FOR ANY REASON WHATEVER . . . EXCEED THE MAXIMUMS ESTABLISHED IN THIS RENT SCHEDULE!

2. WHEN RENT INCLUDES G&E AND HEAT ONLY . . CASEWORKER SHALL ALLOW OR PAY THE "HEAT ONLY INCLUDED" RENT!

3. SINCE TENANT RECEIVES A G&E ALLOWANCE IN THE PRE-ADD GRANT . . . PAYMENT OF ANY G&E PORTION OF RENT IS THE TENANT'S RESPONSIBILITY!

EXAMPLE: TENANT RENTS A 7 ROOM UNFURNISHED FLAT WITH G&E AND HEAT INCLUDED IN RENT.

CASEWORKER SHALL ALLOW OR PAY RENT UP TO $155.80 MAXIMUM!

Shelter Allowance Schedules.

SIZE: 8 OR MORE HABITABLE ROOMS • FLAT

BASE RENT (does not include G&E, Heat, Furnished)	$150.00	$150.00
HEAT ONLY INCLUDED .....ADD:	$ 29.20	$179.20
FURNISHED ONLY INCLUDED .....ADD:	$ 20.00	$170.00
HEAT AND FURNISHED INCLUDED ....ADD:	$ 49.20	$199.20

SIZE: 8 OR MORE HABITABLE ROOMS • SINGLE FAMILY HOUSE

BASE RENT (does not include G&E, Heat, Furnished)	$160.00	$160.00
HEAT ONLY INCLUDED .....ADD:	$ 29.20	$189.20
FURNISHED ONLY INCLUDED .....ADD:	$ 20.00	$180.00
HEAT AND FURNISHED INCLUDED ....ADD:	$ 49.20	$209.20

NOTES: 1. ALLOWANCE OR PAYMENT OF RENT OR SHELTER IN ANY FORM SHALL NOT . . . FOR ANY REASON WHATEVER . . . EXCEED THE MAXIMUMS ESTABLISHED IN THIS RENT SCHEDULE!

2. WHEN RENT INCLUDES G&E AND HEAT ONLY . . . CASEWORKER SHALL ALLOW OR PAY THE "HEAT ONLY INCLUDED" RENT!

3. SINCE TENANT RECEIVES A G&E ALLOWANCE IN THE PRE-ADD GRANT . . . PAYMENT OF ANY G&E PORTION OF RENT IS THE TENANT'S RESPONSIBILITY!

EXAMPLE: TENANT RENTS AN 8 ROOM UNFURNISHED FLAT WITH G&E AND HEAT INCLUDED IN RENT.

CASEWORKER SHALL ALLOW OR PAY RENT UP TO $179.20 MAXIMUM!

(See opposite page)

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RENT SCHEDULE

MONTHLY

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES

	Unfurnished Without Heat & Utilities	Furnished Without Heat & Utilities	Unfurnished With Heat & Utilities	Furnished With Heat & Utilities
1 - 2 Rooms	$70.00	$75.00	$85.00	$95.00
3 - 4 Rooms	$85.00	$90.00	$100.00	$115.00
5 - 6 Rooms	$100.00	$115.00	$130.00	$140.00
7 - 8 Rooms	$120.00	$125.00	$140.00	$160.00
9 - 10 Rooms	$130.00	$140.00	$160.00	$175.00

ORLEANS COUNTY RENT SCHEDULE

Number of Rooms	*Without Fuel* Unfurnished	*furnished*	*With Fuel* Unfurnished	*furnished*
1	$25.	$35.	$ 45.	$ 55.
2	30.	40.	50.	60.
3	40.	50.	60.	70.
4	60.	70.	88.	98.
5	70.	80.	98.	108.
6	70.	80.	103.	113.
7 & 8	75.	85.	108.	118.
9 & 10	80.	90.	118.	128.

It is the intent of this schedule to place maximums on available rentals. The Agency will continue to use community averages in evaluating rental values in the district.

Any deviations upward from this tentative schedule must be sanctioned by the Commissioner or his Deputy.

Water rates to be added to budget where not included in rent.

OSWEGO

September 25, 1972

Mr. Milton Glazier
Acting Area Director
Department of Social Services
333 East Washington Street
Syracuse, New York 13202

Re: Rent Schedule

Dear Mr. Glazier:

We have revised our rental schedule and would like to put this in effect January 1, 1973 if the schedule meets with your approval.

Oswego County excluding Oswego City

No. of tenants	1 or 2	2	3	4	5	6	7	or more
Bedrooms	1	2	2	3	3	4	4	
*Rent	80	85	90	95	100	105	125	
*With Heat	95	105	110	115	125	130	155	

Oswego City

No. of tenants	1 or 2	2	3	4	5	6	7	or more
Bedrooms	1	2	2	3	3	4	4	
*Rent	95	100	105	115	115	120	130	
*With Heat	110	120	125	135	135	145	160	

* Furnished apartments add $10.00 per month to each schedule.

Maximum rents to be paid by Oswego County Department of Social Services per month to State Aide Public Housing according to Bulletin 134 schedules.

Your kind cooperation is appreciated.

Very truly yours,

RUPERT J. COLLINS
COMMISSIONER
(Mrs.) Beattie M. Tracy, C. S. W.
Director of Social Services

OTSEGO

Rental Allowance will generally be budgeted "As PAID" when verified, but not in excess of the above Schedule except as there may be justifiable variations of the Numbers of Persons and Number of Rooms. Variations are to be properly documented. Unfurnished Rooms with Heat or Utilities shall not exceed $140.00 per month.

These Schedules are to be phased in as the situation demands or at time of recheck or redetermination.

Rent Schedule 6/1/71 to Present

No. of Persons	*Maximum No. of Rooms*	*Unfurnished*			*Furnished*		
		Without Heat or Utilities	*With Heat Only*	*With Heat & Utilities*	*Without Heat or Utilities*	*With Heat Only*	*With Heat & Utilities*
1-2	4	$100.00	$120.00	$130.00	$110.00	$130.00	$140.00
3-4	5	100.00	120.00	130.00	110.00	130.00	140.00
5-6	7	100.00	120.00	130.00	110.00	130.00	140.00
7-8	9	110.00	130.00	140.00	120.00	140.00	150.00
9-10	10	110.00	130.00	140.00	120.00	140.00	150.00

The schedule was determined by a review of the rents being allowed from case records and from knowledge of rents being paid in the County. In addition, the agency did a study of housing in the City of Oneonta to see what was available and at what price. The most recent schedule change was necessitated because of Separation of the agency. It was found that making exceptions tended to slow the flow of work in Income Maintenance since an exception went to the desk of the Director of Social Services and then to the Commissioner for approval. The maximums in the new schedule will eliminate exceptions and will more closely follow what clients are paying. The agency is fearful that the situation will arise with families receiving Public Assistance are paying more rent than all

others. It is not planned to grant exceptions with the new schedule.

The County has a shortage of housing available at a reasonable price. In Oneonta rents are much higher due to a higher tax rate and the demand of the College students at SUNY. The agency feels that rents being requested are fair in view of the situation. There is no public housing in the county. A housing project for the elderly is being considered. In the City of Oneonta, many substandard rental units were demolished and parking lots and stores were built in the same location. The Urban Renewal Agency relocated those displaced. The most acute problem is in placing large families. Landlords don't welcome families with children. Many times it is impossible to find housing in the large cities for these families, but if they move into rural areas, they may be isolated due to lack of any public transportation.

(See opposite ☞)

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PUTNAM COUNTY

RENT SCHEDULE

Effective January 1, 1969

	1 - 2	3 - 4	5 - 6	7 or more
Without Heat (unfurnished)	90.00	105.00	110.00	115.00
Without Heat (furnished)	100.00	115.00	120.00	125.00
Heat Provided (unfurnished)	105.00	120.00	125.00	130.00
Heat Provided (furnished)	115.00	130.00	135.00	140.00

RENNSSELAER

Rent Schedule 1/1/68 to present

Consideration shall be given to the size of the family, health factors, suitability of the premises and the prevailing rent scale. The dwelling must meet minimum standards of health and decency. Rent shall be allowed "as paid" up to the maximum allowances as established by agency policy.

In instances where the rent item is higher than the established maximum, authorization for the excess amount must be approved by a person who is higher in authority than the supervisor who regularly approves the authorization.

The following maximum rates, exclusive of Public Housing, have been established as policy:

Family Dwellings:

$95 per month furnished with heat
85 per month unfurnished with heat & utilities
65 per month unfurnished, unheated

Single Room:

$15 per week furnished & heated.

Public Housing:

"As paid" for each particular facility in the county with the maximum established as $80.00 per month plus $4.00 for each person in excess of five.

Room and Board:

$90 for one person

This schedule was determined by each caseworker reviewing his cases and submitting the rent figures to the Director of Social Services who reviewed them. This was done again in 1970 to review the schedule and its adequacy. The average rent was $57.00 regardless of family size. The agency also contacted the Rensselaer County Office of Planning who had done a survey of all housing in the County. They found the average rent being paid is $65.00 and that there were 200-300 rental units available at that time.

(See opposite [illegible])

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V

PROPOSED MAXIMUM RENT SCHEDULE FOR ROCKLAND COUNTY

DEPARTMENT OF SOCIAL SERVICES*

Effective August 1, 1971.

UTILITY ARRANGEMENT	NUMBER OF PEOPLE						
	1-2	3	4	5	6	7	8
No Utilities	$145.00	$165.00	$180.00	$210.00	$240.00-$270.00	$300.00	$330.00
Gas for heat and cooking only	165.00	190.00	200.00	235.00	265.00-$295.00	$330.00	360.00
Gas for heat and cooking, plus electricity	170.00	195.00	205.00	240.00	265.00-300.00	335.00	365.00

*Subject to inspection by and approval of Department of Social Services

Note: The allowance for rent shall be made in the amount actually paid by the recipient but not in excess of the appropriate maximum above. If water is a separate charge, an additional allowance shall be made for the amount required to be paid.

7/22/71

(See opposite ☞)

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MAXIMUM RENTS TO BE PAID BY
ST. LAWRENCE COUNTY DEPARTMENT OF SOCIAL SERVICES
PLR NORTH TO PRIVATE OWNERS*

EFFECTIVE: JULY 1, 1971

NO. OF TENANTS	1	2	3	4	5	6	7	8	9	10 or more
UNFURNISHED										
Without Heat	70	75	80	85	90	95	100	105	110	115
With Heat	90	95	100	105	115	120	130	135	140	145
FURNISHED										
Without Heat	85	90	95	100	105	110	115	120	125	130
With Heat	105	110	115	120	130	135	145	150	155	160

* Rates depend on location, condition of property, assessed valuation and costs to other inhabitants of same building with comparable facilities.

DONALD E. KITCHIN, COMMISSIONER
DEPARTMENT OF SOCIAL SERVICES

SARATOGA

Rent Schedule 1/1/68 to 12/30/70

Saratoga Housing Project

2 Bedrooms	$60.00
3 Bedrooms	65.00
4 Bedrooms	70.00

The rate in the Mechanicville Housing Project is taken from Bulletin 134. Other rents throughout county will have a maximum of $125.00 with utilities. Most will be negotiated by the Administration and the rental figure shall be arrived at with respect to location, size and conditions of building.

Rent Schedule 1/1/71 to present

Rent in Saratoga Housing Project remains same as previous schedule. The rate in the Mechanicville Housing Project is taken from Bulletin 134. Other rents throughout the county will have a maximum of $140.00 with heat and utilities.

The schedule was determined by a survey of rents being included in grants. For the Saratoga Housing Project a rate is negotiated between the agency and the housing project office. When the new rate took effect in January, rents immediately went up to the $140.00 level. There are very few furnished rental units and those are available within the maximum. When the rental unit is unheated, the maximum rent allowance is equal to $140.00 minus the monthly fuel allowance.

The Agency reported that no exceptions have been needed especially with new allowance schedule. The decision to make an exception would be made by the Commissioner. The

only times when exceptions would be considered would be if it could be substantiated that nothing else is available or the family is very large. The Agency is not aware of any families who are paying more than is included in their grant. Since the Agency felt caseworkers were not documenting rent, all rents have been checked and documented by receipts over the past three months so that the Agency feels they have a thorough knowledge of the rental situation at the present time.

It is very difficult to find housing in Saratoga Springs. Many pieces of rental property have been torn down through Urban Renewal and have not been replaced. For the average case, housing can be found. The large families present a problem since there are few large units available. Certain families are denied rental due to record of past destructive behavior.

Many landlords prefer to rent to families who are in receipt of Public Assistance since they feel rent is more secure. The Agency expressed some concern about the new Senior Citizens Housing Project and their policies. In preliminary discussions, the Project officials have indicated that recipients of OAA will not be admitted and if someone who is living there becomes eligible, they will be evicted. The Agency is trying to work out this problem.

• • •

Shelter Allowance Schedules.

SCHENECTADY

MEMORANDUM

November 1, 1972

To: All Service Teams
Certification Unit
Income Maintenance Unit
Validation Unit

From: Mrs. Naomi C. Boyden, Director of Social Services

Re: Rent Schedules

Having reviewed rents that are actually being paid by our clients, the rent schedules are to be revised as follows, effective 12/1/72:

1 room	$ 65.00
2 rooms	70.00
3 rooms	85.00
4 rooms	90.00
5 rooms	95.00
6 rooms	100.00
7 rooms	105.00
Full house	110.00

If heat is included in rent, add no more than $25.00 for heat allowance.

If furniture is included in rent, add $10.00 to above amounts.

Shelter Allowance Schedules.

These are maximum allowances, but in no event do we allow more than actual rent.

NO EXCEPTIONS!

cc: Commissioner R. J. Staszak
Mr. S. Duff
Mr. L. Maré
Mr. R. Karl
Mr. P. Huffmire
Mrs. T. Donlan
Mrs. C. Bickerstaff
Mr. B. Coburn
Mr. A. Teta
Mr. J. Sicluna
Mr. P. Cappello

Shelter Allowance Schedules.

DEPARTMENT OF SOCIAL SERVICES
SCHOHARIE, NEW YORK 2157
RUSSELL PALMER COMMISSIONER
Telephone 295-5134

SCHOHARIE COUNTY

Rent Schedule

Effective January 1, 1972
to the present.

Rent only	$ 75.00 per month
Rent, including heat	$105.00 per month
Rent, including heat and utilities	$125.00 per month

Exceptions to schedule to be made depending on location and condition of property.

RUSSELL PALMER (d & b)
Russell Palmer, Commissioner
Department of Social Services

Shelter Allowance Schedules.

SCHUYLER COUNTY RENT SCHEDULE

Unfurnished	*No Heat or Utilities*	*Incl. Heat*
1 & 2 Rooms	$ 65.00	$ 85.00
3 & 4 Rooms	70.00	90.00
5 & 6 Rooms	80.00	100.00
7 & 8 Rooms	90.00	110.00
9 & 10 Rooms	100.00	115.00

Furnished	*No Heat or Utilities*	*Incl. Heat*
1 & 2 Rooms	$ 75.00	$ 95.00
3 & 4 Rooms	80.00	100.00
5 & 6 Rooms	90.00	110.00
7 & 8 Rooms	100.00	120.00
9 & 10 Rooms	105.00	125.00
Mobile Homes	$ 90.00	$120.00

Shelter Allowance Schedules.

Seneca County Department of Social Services
Box 179
Waterloo, N. Y. 13165

January 1, 1971

No. of Persons	*Heat Oct. 1 May 31*	*Heat Year Round*	*Rent No. of Rooms*	*Rent Maximum Rent*
1 & 2	24.80	17.00	Unfurn. 2-10 rms	$ 70.00
3 & 4	27.40	18.80	Furnished 2-10 rms	75.00
5 & 6	32.60	22.30	Unfurnish. w/util & heat 2-10	
7 & 8	37.80	25.80	rooms	100.00
9 & 10	48.00	29.20	Furnished w/util & heat 2 to 10 rooms	105.00
			Trailer	65.00
			Furnished	70.00
			Unfurn.w/ util & heat	100.00
			Furnished w/util & heat	105.00

Shelter Allowance Schedules.

Seneca County Department of Social Services
Box 179
Waterloo, N. Y. 13165

RENT SCHEDULES
8/29/72

Because it is now impossible to find decent housing for larger families at $70.00 a month we will be changing the rent schedules.

Until the new schedule is prepared:

On new applications: allow up to $90.00 per month plus heat and water, if housing is adequate.

On recertifications: If client is paying more than allowed in budget, increase shelter item as paid, up to $90.00 a month plus heat and water if housing is adequate.

In adding fuel to the budget: If client is paying more than allowed in budget, increase shelter item as paid, up to $90.00 a month plus fuel and water.

We have a further ruling on the rent and security deposits. Mr. Levitt (the State Comptroller) says that we cannot hand this money to the client outright. We must have an agreement between agency and landlord. We will prepare the agreement, hopefully, before we have another request.

Commissioner

(See opposite ☞)

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MAXIMUM RENT SCHEDULE - STEUBEN CO. DSS

Number of Bedrooms	Single Persons Kitchenette	1 or 2 people 1 Bedroom	3 or 4 people 2 Bedrooms	5 or 6 people 3 Bedrooms	7 or 8 people 4 Bedrooms	9 or 10 people 5 Bedrooms or more
(1) Unfurnished without heat and utilities	10.00 wk. 44.00 mo.	60.00 mo.	70.00 mo.	85.00 mo.	100.00 mo.	115.00 mo.
(2) Unfurnished Heat & Utilities Provided	56.00 mo.	74.00 mo.	84.00 mo.	100.00 mo.	118.00 mo.	130.00 mo.
(3) Furnished without heat & Utilities	53.00 mo.	72.00 mo.	82.00 mo.	97.00 mo.	115.00 mo.	127.00 mo.
(4) Furnished with heat &Utilities Provided	15.00 wk. 65.00 mo.	20.00 wk. 86.00 mo.	96.00 mo.	112.00 mo.	130.00 mo.	145.00 mo.

Shelter Allowance Schedules.

RUSSELL B. RAWLEY
Commissioner

Area Code 607
Telephone 687-9930

Tioga County

DEPARTMENT OF SOCIAL SERVICES

R. D. 2, Oswego, N.Y. 13827

New Rent Schedule eff. 3/1/72

Nothing included

$65	Max.	1 or 2	persons	1 bedroom
$90	"	3 or 4	"	2 "
$95	"	5 or 6	"	3 "
$100	"	7 people up—		

Utilities Included

$90	"	"	"
$115	"	"	"
$120	"	"	"
$130	"	"	"

Shelter Allowance Schedules.

WARREN COUNTY

Rent schedule effective Jan. 1965 to the present.

Rooms	*Persons*	*Unfurnished No heat No utilities*	*Furnished No heat No utilities*	*Unfurnished with heat & utilities*	*Furnished with heat & utilities*
1-3	1-2	$50.00	$55.00	$65.00	$70.00
	3-4				
3-5	2-4	60.00	65.00	75.00	80.00
	5, 6, 7				
5-7	4-7	70.00	75.00	85.00	90.00
7-up	7-up	80.00	85.00	95.00	100.00

The schedule was based on a survey of what clients were paying for rent, according to the case record. The figures are maximums broken down by persons, rooms, heat, utilities and furnishings. Some leeway is allowed by the overlapping of family sizes. For example, a 2 person family in housing unfurnished, no heat and no utilities would be entitled to $50 to $60 according to the way schedule is set up. If needed the larger amount is given. Very few exceptions are made. Exceptions are granted in some cases where the family size exceeds 7. The Commissioner makes the decision on any exceptions. If an exception is not granted, the family is advised to look elsewhere for housing or pay the additional rent from their grant. Less than 5% of the case load is paying rent in excess of that included in their grant.

It is difficult to find housing in the county. Generally, housing in the Lake George area is more expensive and may be seasonal. A landlord will rent to clients from October 1 to May 1. There is a housing project in Glens Falls; however, very few clients live there because the apartments are small and not suitable for large families. The agency

finds it much harder to place families with large numbers of children.

There is an active Urban Renewal project in Glens Falls where many of the substandard dwellings have been demolished. The Urban Renewal Agency has been able to find housing for families displaced by the demolition. When the housing was razed, other landlords did not rapidly increase rents. An apartment building is being constructed in Glens Falls for Senior Citizens.

Generally, the housing where clients live is below average in quality. In the city of Glen Falls, a housing inspector will make an evaluation of the housing. In the rest of the county, there is no agency who will become involved in judging the quality of dwellings.

This agency has no families living in motels.

WASHINGTON

Rent schedule effective 12/1/67—12/31/70.

Fort Edward—Hudson Falls—maximum of $85.00 for families and $65.00 for couples. In all other areas of the county, the $60.00 maximum for families and a $50.00 maximum for couples.

Whenever the health or welfare of a client would be affected by this schedule, special consideration will be given after consultation with the Grade A Supervisor or the Commissioner.

Rent schedule effective for 1/1/71.

Maximum rent allowed—$100.00 per month. Whenever the health or welfare of a client would be affected by this schedule, special consideration will be given after consultation with the Grade A Supervisor or the Commissioner.

The 1967 schedule was determined as a result of a staff meeting when caseworkers reported on rents being paid. Caseworkers reported, also, a rent differential for various areas of the county. When it was noted that rents were being increased in 1970, the case records were surveyed to determine rents being paid and the maximum was set. In this survey, it was found that a differential no longer existed.

The $100.00 represents a maximum with no consideration for number of people. Most total units available are not furnished and come with no fuel or utilities. The maximum $100.00 Assumes the unit is without fuel and utilities. If the rental unit is heated, the maximum allowed would be $100.00 plus the monthly fuel allowance for that size family.

Exceptions are made especially in the case of a large family. The exception would be made by the Director of

Social Services after a conference with worker involved with family. In a few cases, the agency has refused to pay the maximum due to the very poor quality of the housing available.

The Director of Social Services feels housing is the greatest need in the community. There is a large amount of substandard housing with no agency in the county with the power to take action related to the quality of the housing. Roughly 20% of the housing used by clients causes concern to the Social Service Staff, however, if the agency helps move a family out, the landlord just re-rents the unit to someone else.

At the present time, there are HUD projects in Hudson Falls and Whithall, but these are open only to people who earn at least 50% of their income. There is no public housing in the county.

Landlords do not discriminate against families in receipt of assistance, but there is no definite discrimination against families with large numbers of children. In houses which are adequate for large families, landlords will turn extra rent in order to get families with fewer children. It is found that some landlords will charge more rent to Public Assistance families figuring the Agency will pay this. Also many clients are seen by landlords as secure rentals since they feel the agency will stand back of rent.

432 County Office Bldg.
White Plains, N. Y. 10671
Westchester County

IV. Shelter

A. *Rent*

Rent is allowed as paid, based on family or individual housing needs and on local low-cost rent levels for housing and rooms furnished and unfurnished.

(Special approval of the Administrative Supervisor, PA Section, for rent in excess of the following schedule must be requested on Form #664.)

Rent Schedule SA-9
Allowance Schedule—Unfurnished—Heat Provided—Effective 7-1-72

	*Monthly Maximum Rent**	
	With Heat	*Without Heat*
1-2 Persons, 1 room "as paid" to a maximum of	$145	$107
1-2 Persons, 2 room studio or shared apt. "as paid" to a maximum of ..	155	118
2-3 Persons, 3 rooms (1 Bedroom) "as paid" to a maximum of	166	129
3-4 Persons, 4 rooms (2 Bedrooms) "as paid" to a maximum of	182	145
3-4 Persons, 5 rooms (2 Bedrooms) "as paid" to a maximum of	198	166
5-6 Persons, 6 rooms (3 Bedrooms) "as paid" to a maximum of	247	209

7-8 Persons, 7 rooms (4 Bedrooms) "as paid" to a maximum of	279	236
9-10 Persons, 8 rooms (5 Bedrooms) "as paid" to a maximum of	322	263
11 Persons and over, 9 rooms and over "as paid" to a maximum of ..	359	289

*NOTE: The determinant for approval for a monthly rent is the number of rooms in a unit and not the number of persons in a family.

The number of persons represents a guide and suggests the minimum number of persons in a family for which approval for a particular sized apartment rental is given. For example, a 5 room unit would not be approved for one person occupancy, nor should a seven person family occupying 6 rooms be approved at the rate for a 7 room unit.

Water Charges

When the tenant recipient is obligated to pay for water as a separate charge, an additional allowance shall be made for the amount required to be paid.

Shelter—Living in Self-Maintaining Household

For children or adults residing with a self-maintaining non-legally responsible relative or friend, the allowance for rent and/or shelter costs shall be computed on a pro-rated basis.

Rent—While in Medical Facility

An allowance for rent shall be made for a period not in excess of 60 days when essential to retain a housing accommodation to which a recipient temporarily receiving care in a medical facility may return upon discharge.

Public Housing

An allowance for rent shall be made for recipients who are tenants of State or Federally-aided public housing not in excess of the following schedules:

Apartment Size	*State Schedule*	*Monthly Rent New Rochelle* (Eff. 8-1-71)	*Peekskill* Eff.) 4-1-72)
"0" Bedrooms	$ 65.00	——	——
1 Bedroom	77.00	$ 84.00	$ 84.00
2 Bedrooms	90.00	99.00	99.00
3 Bedrooms	101.00	112.00	112.00
4 Bedrooms	107.00	120.00	120.00
5 Bedrooms	110.00	125.00	125.00

(NOTE: Required fees or charges shall be provided for such items as security deposit, extermination, deposit against breakage and loss, and keys. See Page A-17.)

B. *Shelter Allowance for Home Owners*

Purchase of Interest in Low-Cost Housing Development
The Administrative Supervisor may approve a grant, not to exceed $750.00 toward the purchase of an interest in a cooperative unit in the low-cost housing development. The Housing Supervisor shall first be asked to review this plan. Assignment of recipient's equity in such cooperative housing shall be required.

Carrying Charges

Property costs in lieu of rent are allowed when they are not in excess of a reasonable monthly rental. Such costs are estimated on actual bills and may include taxes, water rates, special assessments, and interest on mortgage. Fire insurance is allowed as paid when due.

Shelter Allowance Schedules.

Maximum Rent Allowance Schedule Wyoming 12/6/72

Number Sleeping Rooms Needed		
1 Room—No Cooking	$10.00/week	$43.00 month
1 Sleeping Room		65.00 basic
2 Sleeping Rooms		80.00 basic
3 or more Sleeping Rooms		95.00 basic

Under certain circumstances, $10.00 exception may be made with supervisory approval.

$10.00 additional when completely furnished.

$5.00 when stove and refrigerator furnished only (partly furnished).

Basic allowance does not include heat. If needed, heat can be added per heating schedule.

(See opposite ☞)

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YATES COUNTY
RENT SCHEDULE
MONTHLY
EFFECTIVE 4/1/72

RENT WILL BE ALLOWED ON A SLIDING SCALE -- MAXIMUM AND MINIMUM AS SHOWN ON CHART

ROOMS	UNFURNISHED	FURNISHED	UNFURNISHED WITH UTILITIES	FURNISHED WITH UTILITIES
1 & 2 & 3	$50.00 - $60.00	$60.00 - $70.00	$60.00 - $70.00	$70.00 - $80.00
4 & 5 & 6	$60.00 - $70.00	$70.00 - $80.00	$70.00 - $80.00	$80.00 - $90.00
7 & 8 & 9 & 10	$70.00 - $80.00	$80.00 - $90.00	$80.00 - $90.00	$90.00 - $100.00

WHEN HEATING FUEL IS FURNISHED WITH RENT, THE HEATING SCHEDULE, SA-6 ON PAGE J-14 IN BULLETIN 134, FOR THE COUNTY OF YATES, ON A YEAR ROUND BASIS, IS ADDED TO THE ABOVE FIGURES TO COMPUTE THE TOTAL RENT ALLOWANCE.

Excerpts From *Simplified Methods for Determining Needs*, HEW, 1964, Defendants' Exhibit "C".

METHODS

Although several methods of presenting cost standards for workers to use are available to States, the method chosen must be statewide in its application. It is strongly recommended that, if at all feasible, identical cost standards also be used statewide. Any variation in cost standards by areas within a State must be justified by facts.

The following three forms may suggest to States methods which they may use to simplify the process of determining need.

Each form is designed to serve all public assistance programs. A common standard is used because the basic requirements of all people are the same regardless of which program serves them.

The amount of total requirements should be printed on each form for the worker to use as a budget form. Each form also has space for computations and verifications of income. Instructions are printed on the back of each form.

Even though cost standards may vary by areas, all counties within the State must use the same form.

For example, if a State uses fuel cost standards by areas, costs can include these areas in the total requirements. Each form showing different total requirements will need to be numbered separately, with the particular areas to which the form applies listed on the back.

Methods I and III (pp. 2 and 4) include cost figures for all of the basic items of requirements. If a recipient's need

for any of these items is fully met each month without cost to him, the value to be shown as income should never be in excess of the amount included for the item in requirements. Method II (p. 3) differs from Methods I and III by permitting the worker to enter the amount of the standard for shelter and special needs.

Method I

Method I combines cost standards for all basic requirements.[1] The worker may use the column appropriate to the number of persons in the assistance group.[2]

The amount of total basic requirements can be printed on the form in the space where dollar marks appears on the "dummy" form. The form will then serve as a budget form for the worker to use without having to transfer the figures. This form does NOT provide for special need items.

Method I is applicable when State policies for need determination relate only to a single assistance group, without consideration of other assistance groups in the same household or of non-needy members of the same household.

The net monthly income can be computed on the form and subtracted from the total requirements to obtain the amount of the deficit and grant.

---

[1] Includes clothing, electricity, food, fuel, household equipment, household supplies, medicine-chest supplies, personal incidentals, phone, school costs, shelter, transportation, and water.

[2] Assistance group, as used in this paper, means those persons in a single public assistance program whose requirements are included in the determination of need.

The first column is provided for one adult and is divided by type of living arrangement. The cost standards are usually higher for a person who lives alone.

The State should provide an amount (in parentheses under "Children Only") for a child who does not live with parents, or whose caretaker is not needy—for example, when the child is budgeted only for food, clothing, personal incidentals, and school costs.

[Form Omitted.]

• • •

METHOD II

Method II combines cost standards for all basic requirements[1] except shelter and includes space for special needs. As in Method I, the worker may use the column appropriate to the number of persons in the assistance group.

The amount of total basic requirements (except shelter) can be printed on the form in the space where dollar marks appear on the "dummy" form. The form will then serve as a budget sheet for the worker to add shelter cost to the other requirements without having to transfer the figures.

Method II, like Method I, is applicable when State policies for need determination relate only to a single assistance group, without consideration of other assistance groups in the same household or of non-needy members of the same household.

---

[1] Includes clothing, electricity, food, fuel, household equipment, household supplies, medicine-chest supplies, personal incidentals, phone, school costs, transportation, and water.

The net monthly income can be computed on the form and subtracted from the total requirements to obtain the amount of the deficit and grant.

The first column is provided for one adult and is divided by type of living arrangement. The cost standards are usually higher for a person who lives alone.

An amount is provided (in parentheses under "Children Only") for a child who does not live with parents, or whose caretaker is not needy—for example, when the child is budgeted only for food, clothing, personal incidentals, and school costs.

Form Method II.

(See opposite ☞)

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Form No. _____

Date _____
Case Name _____
Case Number _____

METHOD II

Requirements and Budget Form for OAA, AB, AFDC, APTD 1/

A.	Number of Persons in Assistance Group: 1 Adult Alone	1 Adult Not Alone	2	3	4	5	6	7	8	Over 8 (.)	Children Only.
B. Requirements	$	$	$	$	$	$	$	$	$	$	$X(No. of Children
C. Shelter											
D. Special Needs											
E. Total											
F. Less Income											
G. Deficit											
H. Grant											

MONTHLY INCOME

Wages _____

OASI _____

Pension _____

Other _____

_____

Total _____

VERIFICATION OF INCOME

Instructions: See reverse side

1/ Includes clothing, electricity, food, fuel, household equipment, household supplies, medicine-chest supplies, personal incidentals, phone, school costs, transportation, and water.

Instructions:

Circle number of persons in assistance group (line A). Enter the amount of standard for shelter and special needs (if any) on lines C and D. Add lines B, C, and D to arrive at total (line E). Compute income in space provided at bottom of page, showing verifications. Enter total income (line F). Subtract from total requirements (line E) to obtain the deficit (line G) and the amount of the grant (line H).

Note: 1. For each person in excess of 8, show the number in the parentheses in the "over 8" column and add $——— for each such person to the printed figure already provided.

2. For children who do not live with parents, or whose caretaker is not needy, that is, for children who are budgeted only for food, clothing, school costs, and personal incidentals, multiply the number of children by the amount provided in the last column.

METHOD III

Method III combines cost standards for all basic requirements[1] but provides a different technique for using the requirements in arriving at the amount of assistance to be paid.

Many States budget the requirements for the assistance group according to the number of persons in the total household; that is, when others in the household cook and eat with the assistance group and share common household expenses, these expenses are prorated accordingly.

[1] Includes clothing, electricity, food, fuel, household equipment, household supplies, medicine-chest supplies, personal incidentals, phone, school costs, shelter, transportation, water.

Method III is designed to take this into account. The same method is applicable when two or more assistance groups live as one household.

For example, in method III if the AFDC group is composed of 3 persons who live in a household with 3 other persons, the worker will circle the figure 3 in the left stub and also circle the amount of money (dollar marks on "dummy" form) shown under 6 following across from 3 and record in the computation column on the right hand side of the form. This amount of money is for the assistance group of 3 but is different from the amount shown under the household of 3 because the group lives with 3 other people—a total household of 6. If the assistance group of 3 lives in a household alone, the worker will circle the amount under a household of 3 and record in the computation column.

This form, like Method I, has been designed to provide for the amount of the total requirements to be printed on the form. It is necessary for the worker to enter the amount in the computation column. Space is provided on the back of the form for verification of income. Space may be provided on this form for the shelter and special need items if they are not included in total requirements (see Method II).

Form Method III.

(See opposite ☞)

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Form No. _____
Date _____

METHOD III

Requirements and Budget Form for OAA, AB, AFDC, AFDC, APTD 1/

Number of Persons in Assistance Group	Living in a Household Composed of									
	1	2	3	4	5	6	7	8	9	10 or more
1	$	$	$	$	$	$	$	$	$	$
2		$	$	$	$	$	$	$	$	$
3			$	$	$	$	$	$	$	$
4				$	$	$	$	$	$	$
5					$	$	$	$	$	$
6						$	$	$	$	$
7							$	$	$	$
8								$	$	$

1/ Includes clothing, electricity, food, fuel, household equipment, household supplies, medicine-chest supplies, personal incidentals, phone, school costs, shelter, transportation, water.

Instructions: See reverse side.

Date _____
Case Name _____
Case Number _____

Computations
Circle Number of Persons in Assistance Group
Circle Size of Household; Enter This Amount Below:

Total Basics _____

Additional over 8 ( ) _____

Income _____

Deficit _____

Grant _____

_____

Monthly Income

Wages _____

OASI _____

Pension _____

Other _____

_____

_____

_____

Total Income _____

Instructions:

NOTE: 1. For each person in excess of 8, show the number in parenthesis in the space provided under computations and add $..... for each such person to the amount shown for the assistance group of 8.

2. For children who do not live with parents, or whose caretaker is not needy, that is, for children who are budgeted only for food, clothing, school costs, and personal incidentals, multiply the number of children by the amount provided in the last column.

Excerpts From *Shelter Costs and Selected Shelter Characteristics of New York State Public Assistance Recipients*, 1971 N.Y.D.S.S. Shelter Cost Survey, Defendants' Exhibit "D".

HIGHLIGHTS

1. The Statewide average shelter cost for public assistance recipients is $94. The Suburban New York average ($145) is considerably higher than that of New York City ($92), Upstate Urban New York ($97), and Rest of State ($90). Table 1

   —Statewide, the average shelter cost ranges from $80 for a person living alone to $129 for a household of seven or more persons. In Suburban New York, however, the respective costs range from $101 to $222. Again, these figures are considerably higher than those of other areas of the State. Table 1

   —The Statewide average cost for a four person household is $113. For the four person household the highest average cost is in Nassau County ($191); the lowest average cost is in Schoharie County ($81). Tables 1, 3 and 4

2. The diversity of shelter costs in the State can be seen from the ranges of actual costs found in this study. For example, the lowest shelter cost for a four person household was $27 (Westchester County), while the highest for the four person household was $303 (Suffolk County), a range of $276. For 7 or more person households the costs ranged from a minimum of $21 (Manhattan) to a maximum of $490 (Westchester), a range of $469. Tables D-1, D-2 and D-3

Shelter Costs and Characteristics—1971 N.Y.D.S.S. Shelter Cost Survey.

3. Statewide, 84% of the case load has the cost of fuel included in rent. This high Statewide average is largely due to New York City (96%) and the Suburban area (74%). In Upstate Urban areas and Rest of State, this figure is less than 50%. Table 6

4. About 14% of the public assistance caseload resides in public housing. Most of these are in the New York City (17%) and Upstate Urban areas (12%). Table 11

5. Statewide, 3% of the caseload lives in client-owned homes. The largest percentage of client home owners is found in Rest of State (13%), with Suburban New York following (9%). There are relatively few client-owned homes in Upstate Urban areas (5%) and in New York City (0.8%). Table 11

Sampling Plan

The sample drawn for the purposes of this study numbered 17,458 generally usable cases which were randomly drawn from the 62 Upstate agencies and the 43 New York City welfare centers. Of these, 11,329 were usable for determining shelter cost; 6129 cases represented public housing and client-owned homes.***

The sampling plan provides requirements as to how the data are to be drawn and ensure adequate numbers of representative cases. The basic sample design was a disproportionate stratified sample, distinguishing between single person and family cases. Since a relatively large proportion of single person cases could be expected to live in single person households, it was sufficient to draw a relatively small sample of these cases to provide enough for analysis

of shelter costs of single person households. However, it was necessary to draw a larger sample of family cases since the sample would be spread across household sizes 2 through 7+. The actual "pulling of cases" was done on the basis of case number endings. Since case numbers are assigned in no systematic way, this procedure assures a random sampling from each District and welfare centers.

• • •

Method of Reporting

The weighted arithmetic means of shelter costs are presented in tabular form for each district and for the five boroughs of New York City individually, and also for the often-used classifications of New York City, New York Metropolitan districts, Upstate Urban districts, and "Rest of State." The means are shown for each household size and for all household sizes combined.

The figures shown in Tables 1 through 5 are the weighted means of rents paid by recipients, adjusted with a current fuel pricing by household size where rent does not include cost of fuel for heat.

Many of the means for various household sizes of individual districts are subject to sampling error because many are based on small sample sizes. Means are provided, however, for each household size by district since these data provide the most recent estimates of shelter cost, and for reasons of completeness and comparability.

Supplemental tables to Tables 1 through 5 are presented in Appendix D and E. Tables in Appendix D show the ranges and extremes of the cases from which the means in Tables 1-5 are computed. Tables in Appendix E show the number of sample cases in each cell of Tables 1-5.

Also provided in the body of report are figures representing the estimated numbers and percents of recipients whose cost of fuel for heat is included in rent, and the estimated numbers and percents of recipients who live in public housing. These figures are presented for each district and the four major sub-divisions listed above.•

• It was also intended to report on the estimated numbers and percents of recipients who dwell in furnished vs. non-furnished rental units. However, the large number of "unknowns" regarding this question make such an analysis impractical.

(See opposite ☞)

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Table 2

New York City Boroughs

Mean Shelter Costs of PA Recipients by Household Sizes *
(in dollars)

	Household Sizes							
	1	2	3	4	5	6	7+	Overall Mean
New York City	77	91	98	106	111	109	118	92
Boroughs								
Bronx	77	94	99	102	104	109	112	94
Brooklyn	76	92	98	112	115	116	128	96
Manhattan	76	79	85	89	98	92	90	81
Queens	81	103	121	135	136	147	179	106
Staten Island	85	115	141	135	151	156	198	118

* Excludes public housing and recipient-owned homes.

Table 3

Suburban New York Districts

Mean Shelter Costs of PA Recipients by Household Sizes *
(in dollars)

	Household Sizes							
	1	2	3	4	5	6	7+	Overa Mean
Suburban New York	101	138	165	179	187	202	222	145
Districts								
Nassau	104	141	178	191	195	207	246	148
Rockland	107	155	150	180	176	211	253	145
Suffolk	107	154	171	190	199	207	225	162
Westchester	92	119	145	148	162	186	193	124

* Excludes public housing and recipient-owned homes.

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Table 4

Upstate Urban New York

Mean Shelter Costs of PA Recipients by Household Sizes *
(in dollars)

	Household Sizes							
	1	2	3	4	5	6	7+	Overall Mean
Upstate Urban New York	73	96	107	115	123	122	135	97
Districts								
Albany	60	85	99	110	102	122	136	85
Erie	63	82	90	97	97	105	112	80
Monroe	93	122	129	133	153	143	155	124
Niagara	74	91	102	107	116	128	127	94
Oneida	73	87	96	100	104	106	115	88
Onondaga	81	101	115	130	133	131	149	111
Rensselaer	67	78	75	93	88	90	91	77
Schenectady	70	88	105	112	114	118	129	93

* Excludes public housing and recipient-owned homes.

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Table 5

Rest of New York State

Mean Shelter Costs of PA Recipients by Household Sizes*
(in dollars)

	Household Sizes							
	1	2	3	4	5	6	7+	Overa Mean
Rest of New York State	69	90	99	106	108	111	114	90
Districts								
Allegany	62	71	82	85	94	95	94	76
Broome	75	89	108	119	132	117	138	101
Binghamton	66	98	109	121	124	133	138	93
Union	82	100	109	131	123	128	162	104
Cattaraugus	68	87	91	99	106	91	113	85
Cayuga	65	95	92	113	102	91	107	85
Auburn	76	86	100	107	109	115	125	92
Chautauqua	62	80	81	96	86	93	102	80
Jamestown	60	72	83	90	94	89	92	74
Chemung	71	92	101	101	110	108	127	94
Chenango	57	83	109	102	125	110	111	91
Clinton	60	75	87	91	96	87	97	76
Columbia	68	91	86	85	98	96	104	82
Cortland	69	99	102	110	111	124	123	91
Delaware	56	86	89	98	96	102	104	71
Dutchess	80	97	126	123	123	146	137	105
Poughkeepsie	72	100	112	118	105	120	136	93
Essex	51	68	88	88	87	96	108	71
Franklin	51	69	78	85	94	94	85	76
Fulton	66	70	83	86	99	94	90	75

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Table 5 (Cont.)

Rest of New York State

Mean Shelter Costs of PA Recipients by Household Sizes
(in dollars)

	Household Sizes							
	1	2	3	4	5	6	7+	Overall Mean
Genesee	74	101	107	105	119	134	123	98
Greene	75	93	93	108	97	104	108	85
Hamilton	59	67	79	88	80	-	91	71
Herkimer	58	72	77	94	89	90	93	71
Jefferson	59	79	86	93	89	94	104	78
Lewis	63	90	92	88	90	100	102	80
Livingston	71	84	99	107	108	121	105	91
Madison	66	83	111	117	108	124	113	93
Montgomery	55	77	78	91	89	82	92	74
Ontario	88	100	100	120	127	132	127	106
Orange	84	103	109	107	120	120	130	104
Orleans	51	76	96	106	99	109	105	84
Oswego	66	79	89	99	91	118	115	85
Oswego	64	89	113	109	132	107	103	82
Otsego	61	104	95	106	107	94	109	83
Putnam	116	111	154	160	212	177	181	133
St. Lawrence	63	82	91	103	98	107	103	85
Saratoga	71	90	106	103	94	104	108	92
Schoharie	65	94	94	81	95	124	134	75
Schuyler	66	79	103	99	99	109	100	83
Seneca	76	83	95	94	98	126	102	86
Steuben	66	69	81	93	100	101	99	79

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Table 5 (Cont.)

Rest of New York State

Mean Shelter Costs of PA Recipients by Household Sizes
(in dollars)

	Household Sizes							
	1	2	3	4	5	6	7+	Overal Mean
Sullivan	84	99	112	106	117	129	141	97
Tioga	67	82	82	103	96	97	104	85
Tompkins	91	111	133	144	136	138	156	118
Ulster	70	107	112	119	110	134	143	95
Warren	66	92	100	119	111	111	120	94
Washington	59	80	94	90	100	92	107	79
Wayne	81	90	101	113	107	113	107	96
Wyoming	68	89	95	101	100	118	107	80
Yates	75	76	69	96	80	100	95	82

* Excludes public housing and recipient-owned homes.

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Letter From Davis S. Kellogg to Borge Varmer and Letter From Elmer W. Smith to David S. Kellogg, Defendants' Exhibit "E".*

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES
1450 Western Avenue
Albany, New York 12203

ABE LAVINE
Commissioner
FELIX INFAUSTO
Deputy Commissioner

December 4, 1973

Borge Varmer
Regional Attorney
Social & Rehabilitation Service
Region II
Department of HEW
26 Federal Plaza
New York, New York 10007

Dear Mr. Varmer:

Pursuant to our conversation of last week, I am requesting an opinion by your office on the legitimacy of 18 NYCRR 352.31(d) [352.30(c) and (d)]. Specifically, the questions for which I am requesting an answer are the following:

1) Is a state policy of pro-rating a shelter allowance so as to reflect the percentage of public assistance recipients residing in a household valid under 45 CFR 233.90?

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* Repeating submission to the United States Court of Appeals for the Second Circuit, pp. 153-156 *ante*.

Letter From Kellogg to Varmer.

2) If a state grants a full shelter allowance to an AFDC (ADC) recipient who has persons not in receipt of public assistance residing with him, is the total expenditure thus made reimbursable to the same extent as a shelter allowance made to an AFDC household consisting entirely of recipients?

As you are aware, I am asking these questions in connection with this Department's position in the case of *Hurley* v. *Lavine*. As the appeal in the case is in an advanced stage, I sincerely implore you to expedite your reply as much as possible.

Sincerely yours,

DAVID S. KELLOGG
Senior Attorney
New York State Department
of Social Services

Letter From Smith to Kellogg.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Region II
Federal Building
26 Federal Plaza
New York, New York 10007

SOCIAL AND REHABILITATION SERVICE

January 15, 1974

Mr. David S. Kellogg, Esq.
Senior Attorney
New York State Department
of Social Services
1450 Western Avenue
Albany, New York 12203

Dear Mr. Kellogg:

This is in response to your letter of December 4, 1973, to the Regional Attorney, requesting this Department's interpretation of the validity of the New York State regulation 18 NYCRR 352.30(c) and (d). Since you raise a policy question the matter was referred to this office.

Specifically you asked:

"1) Is a state policy of pro-rating a shelter allowance so as to reflect the percentage of public assistance recipients in a household valid under 45 CFR 233.90?

2) If a State grants a full shelter allowance to an AFDC (ADC) recipient who has persons not in receipt of public assistance residing with him, is the total expenditure thus reimbursable to the

Letter From Smith to Kellogg.

same extent as a shelter allowance made to an AFDC household consisting entirely of recipients?"

In response to your first question, HEW has permitted states to prorate shelter allowances to reflect the percentage of public assistance recipients in a household. Such a proration is not considered an assumption of income, but rather a recognition that per-individual costs decrease as the number of individuals living together increases.

In response to your second question, it has been the policy of HEW to allow federal matching for AFDC shelter payments when a state grants a full shelter allowance to an AFDC recipient who has persons not in receipt of public assistance residing with him.

Sincerely yours,

ELMER W. SMITH
Regional Commissioner

Notice of Motion to Strike on Behalf of Rose Hurley.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROSE HURLEY, et al.,

Plaintiffs,

against

BARRY VAN LARE, et al.,

Defendants.

TO THE DEFENDANTS:

PLEASE TAKE NOTICE, that upon the annexed affidavit, plaintiffs will move this Court on the 19th day of July, 1974 at 9:30 A.M. or as soon thereafter as counsel can be heard at a motion term at the United States Courthouse, Foley Square, New York, New York, for an order pursuant to Rule 12(f) of the Federal Rules of Civil Procedure striking paragraphs 14 and 15 and to strike and seal Exhibit "A" of defendants Van Lare and Lavine's Answer on the grounds that they are immaterial and impertinent in violation of Federal Rule of Civil Procedure 12(f), and that the disclosure of Exhibit "A", an excerpt from the case-worker's record, violates New York Social Services Law, § 136(2), and for such other and further relief as may be just and equitable.

Dated: July 3, 1974, White Plains, New York.

Respectfully submitted,

MARTIN A. SCHWARTZ
The Legal Aid Society of
Westchester County
By: Martin A. Schwartz, of Counsel
Lawrence S. Kahn, of Counsel
Attorneys for Plaintiffs

Affidavit of Martin A. Schwartz in Support of Motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF WESTCHESTER } ss.:

MARTIN A. SCHWARTZ, being duly sworn, deposes and says that:

(1) I am an attorney duly admitted to practice law in this State and in this Court. I am associated with The Legal Aid Society of Westchester County, attorney for plaintiffs herein. I am fully familiar with all of the proceedings herein. I make this affidavit in support of plaintiffs' motion to strike paragraphs 14 and 15 of defendants Van Lare and Lavine's Answer and to strike and seal Exhibit "A" to this answer.

(2) Defendants served their answer on plaintiffs' counsel on June 26, 1974. At the hearing before the Three-Judge Court in this action on June 26, 1974, defendants Van Lare and Lavine's counsel made an offer of proof as to the matters in paragraphs 14 and 15 of defendants' answer and Exhibit "A" thereto, namely, alleged gifts made by the "lodger" in the Hurley home allegedly made *prior* to the time the lodger resided in the home. Plaintiffs' counsel objected to the admissibility of this evidence on the following grounds:

(A) Defendants had admitted all the essential allegations of plaintiff Hurley's claim in their Rule 9-G Statement

in response to plaintiffs' motion for summary judgment. This included an admission that the "lodger" made no contribution to the Hurley family during the relevant four month period when the "lodger" resided with the Hurley family.

(B) Defendant Van Lare, in his "Decision After Fair Hearing", found that the "lodger" made no contribution to the Hurley family.

(C) The alleged gifts were alleged to have been made *prior* to the time the "lodger" resided in the home, and that, in any case, whether the "lodger" makes a gift to the family is an irrelevant consideration under the challenged regulations. Thus, whether these gifts were made is irrelevant to the subject matter of this action.

After hearing argument on this offer of proof, the Three-Judge Court excluded defendants' proffered evidence.

(3) In addition to the fact that the allegations set forth in paragraphs 14 and 15 and Exhibit "A" of defendants' answer are totally irrelevant to the subject matter herein, its disclosure by defendants' answer, which is now a matter of public record, violates plaintiff Rose Hurley and her children's protection of confidentiality contained in New York Social Services Law, § 136(2). Section 136(2) expressly makes confidential communications relating to a person receiving public assistance to a public welfare official or other employee, and provides that these communications may be disclosed only "*by* authority of the county, city or town public welfare official, to a person or agency considered entitled to such information." There has been no showing that the *local* agency has authorized the release of plaintiff Hurley's case record (DXA), and any such release at this time, after the court has excluded the proffered evidence, would be a clear abuse of discretion.

Since the matter contained in "DXA" is irrelevant to the subject matter of the suit, the bringing of this action cannot constitute a waiver of the confidentiality protection afforded plaintiff Hurley and her children under New York Social Services Law § 136(2).

(5) Because paragraphs 14 and 15 of the answer and Exhibit "A" annexed thereto are irrelevant to the issues, as determined by this Court's rejection of the offer of proof, they should be stricken from the answer pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. Moreover, because the disclosure of that part of the case record (DXA) violates the confidentiality rights of plaintiff Hurley and her children guaranteed by New York Social Services Law, § 136(2), it should be stricken and ordered sealed.

WHEREFORE, plaintiffs respectfully pray that the motion to strike be granted, and that this Court grant such other and further relief as may be just and equitable.

(Sworn to by Martin A. Schwartz, July 3, 1974.)

Affidavit of Judith A. Gordon, in Opposition to Motion to Strike.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JUDITH A. GORDON, being duly sworn, deposes and says:

She is an Assistant Attorney General in the office of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for the defendant public officers above named, and as such she is thoroughly familiar with the facts and matters in issue in this action.

This affidavit is submitted in opposition to plaintiffs' motion to strike paragraphs "14" and "15" and to strike and seal Exhibit "A" of defendants Van Lare and Lavine's answer on the grounds that they are immaterial and impertinent under Rule 12(f) of the Federal Rules of Civil Procedure and that the disclosure of Exhibit "A", an excerpt from plaintiff Hurley's case record, violates New York Social Service Law § 136(2).

THE MOTION TO STRIKE SHOULD BE DENIED

Motions to strike redundant, immaterial, impertinent or scandalous matter under FRCP 12(f) are not favored, *Cohen* v. *City of Miami,* 54 F.R.D. 274, 277 (S.D. Fla. 1972); *Thompson* v. *United Artist Theatre Circuit, Inc.,* 43 F.R.D. 197 (S.D.N.Y. 1967); *Securities and Exchange Commission* v. *Quing N. Wong,* 252 F. Supp. 608 (D. P.R.

1966), and should be denied unless the allegations have no possible relation to the controversy, *Augustus* v. *Board of Public Instruction of Escambia County, Florida,* 306 F. 2d 862 (5th Cir. 1962), and cause prejudice to one of the parties. *King* v. *Georgia Power Company,* 295 F. Supp. 943 (N.D. Ga. 1968). Even where the allegations come within the literal meaning of the terms of the Rule 12(f), a motion to strike will be denied except upon a showing of prejudice to the moving party. *Dimet Proprietary, Limited* v. *Industrial Metal Protectives,* 109 F. Supp. 472, 474 (D. Del. 1952); *Tivoli Realty* v. *Paramount Pictures,* 80 F. Supp. 800, 803 (D. Del. 1948). "Th[e] court has repeatedly asserted that motions to strike are not regarded with favor. Generally speaking they should be granted only where the allegations are clearly immaterial to the controversy and are prejudicial . . ." *H. K. Porter Co.* v. *Bremer,* 11 F.R.D. 89, 90 (N.D. Ohio 1950). See also, *King* v. *Georgia Power Company, supra* at 948; *Budget Dress Corp.* v. *International Ladies' Garment Workers' Union, AFL-CIO,* 25 F.R.D. 506, 508 (S.D.N.Y. 1959); *Mil-Hall Textile Co.* v. *Dun & Bradstreet Inc.,* 160 F. Supp. 778, 780 (S.D.N.Y. 1958); *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.,* 214 F. 2d 891 (5th Cir. 1954).

Plaintiff Hurley does not claim on this motion, nor has she claimed heretofore, that the allegations contained in paragraphs "14" and "15" of the answer or defendants' Exhibit "A" annexed thereto are prejudicial in any way. On the contrary, the argument in court (T. 139-141) and the affidavit submitted on this motion rest on the theory that the allegations are merely irrelevant (Affidavit of Martin A. Schwartz, sworn to July 3, 1974, paragraphs 2(A), (B), (C) and (3), (5) [sic]). Thus plaintiff has failed to claim, much less to show, the requisite prejudice necessary to support her motion. *Mil-Hall Textile Co.* v. *Dun & Bradstreet, Inc., supra; Avon Pub. Co.* v. *American*

News Co., 122 F. Supp. 660 (S.D.N.Y. 1954); *Barnes* v. *A. Sind Associates*, 32 F.R.D. 39, 40, (D. Md. 1963); *Giraud* v. *Teamsters Chauffeurs, Warehousemen and Helpers, Local 901*, 46 F.R.D. 5, 6 (D. P.R. 1969); *Singer* v. *Dorr*, 38 F.R.D. 167, 169 (E.D. La. 1965); *King* v. *Georgia Power Company, supra; H. K. Porter Co.* v. *Bremen, supra; Dimet Proprietary Limited* v. *Industrial Metal Protectives, supra; Tucker* v. *A & P Food Stores*, 9 F.R.D. 607 (N.D. Ohio 1949).

Even if the court considers plaintiff's claim of irrelevance in the absence of any claim or showing of prejudice, the motion to strike should nonetheless be denied.

In support of this claim, plaintiff relies on two factual assertions. First, the alleged contributions were made by ADR prior to the four month period (November 1970-February 197[1] for which ADR was treated as a lodger under 18 N.Y.C.R.R. § 352.30(d) and 352.31(a)(3)(IV); Second, that the state statutes and regulations do not prohibit such contributions or gifts [Martin A. Schwartz affidavit, paragrahs 2(A)(B),(C) and (5)].

While plaintiff is correct in her first assertion that the contributions alleged were not made during the four month "lodger" period, they are not for that reason irrelevant.* In defendants' view, the allegations of prior contributions are germane since they, taken with the uncontested fact that plaintiff's paramour was employed in the same capacity both at the time he made the contributions and at the time he was found to be a "lodger," illustrate one of the abuses of the welfare system which § 352.30(d) is intended to prevent, namely an individual who has the capacity to constitute his share of the rent obtaining free

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* Notably, if the contributions had been made during the "lodger" period, ADR would have been a "contributing lodger" under § 352.30(d) not a "non-contributing lodger" and this case could not have been litigated in its present form.

shelter at public expense. See defendants' Memorandum of Law to the Three-Judge District Court, pp. 34-35, 66. However, even if the Court rejects defendants' view of the direct relevance of the prior contributions, they should be retained in the record as background information, particularly in view of plaintiff's offer of proof on the nature of the living arrangements among welfare recipients. *South Side Drive-In Co.* v. *Warner Brothers Picture Distributing Corp.*, 30 F.R.D. 32 (D. Penn. 1962); *Irving Berlin Inc.* v. *Anziano*, 4 F.R.D. 33 (S.D.N.Y. 1944).

THE USE OF AN EXCERPT FROM PLAINTIFF HURLEY'S CASE RECORD DOES NOT VIOLATE HER RIGHT TO CONFIDENTIALITY UNDER SOCIAL SERVICES LAW § 136(2)

The confidentiality provided for governmental records by statute is not absolute. *People* v. *Feuerstein*, 293 N.Y.S. 239, 242 (Queens Co. 1937). When an individual has accepted benefits offered under the public assistance program, then publicly disclosed his relationship with the program, he is deemed to have waived his right to the confidentiality of his records. *People* v. *Feuerstein, supra*, at 241-242; *Turner* v. *Barbaro*, 287 N Y S 2d 542, 543 (Nassau Co. 1967), aff'd 298 N Y S 2d 674 (2nd Dept. 1969); *Kelly* v. *Wasserman*, 185 N Y S 2d 538 (Court of Appeals 1959).

Plaintiff's argument that the use of her case record was not authorized under the terms of Section 136(2) is clearly misplaced [Martin A. Schwartz affidavit, paragraph (3)].

The statute specifically provides for the disclosure of "all communications and information" relating to a public assistance recipient to the Commissioner of Social Services or his authorized representative. In the case at bar, the Attorney General of the State of New York, is the authorized representative of the Commissioner of Social Services.

Should the Court be concerned with any potential harm to plaintiff Hurley from further public exposure of the facts contained in the case record excerpt, the proper course of action is to order the excerpt sealed. It is your deponent's understanding that this procedure was in fact followed in *Wyman* v. *James,* 400 U.S. 309 (1971).

WHEREFORE, your deponent prays for an order denying plaintiff's motion to strike paragraphs "14" and "15" of the Answer and to strike and seal Exhibit "A" annexed thereto.

(Sworn to by Judith A. Gordon, July 19, 1974.)

Order Granting Motion to Strike.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiffs having moved this Court to strike paragraphs 14 and 15 of defendants Van Lare and Lavine's Answer and to strike and seal Exhibit "A" to defendants Van Lare and Lavine's Answer, on the ground that this matter is immaterial and impertinent in violation of Federal Rule of Civil Procedure 12(f) and that the disclosure of Exhibit "A" to the answer violates New York Social Services Law §136(2), and defendants Van Lare and Lavine having submitted an affidavit in opposition to this motion, the Court having taken this matter under sub-

mission and having granted plaintiffs' motion to strike, it is

ORDERED that paragraphs 14 and 15 of defendants Van Lare and Lavine's answer and Exhibit "A" to defendants Van Lare and Lavine's answer be and hereby are stricken from the answer, and it is further

ORDERED that Exhibit "A" to defendants Van Lare and Lavine's answer be sealed so as to protect the confidentiality protection of New York Social Services Law §136(2); and it is further

ORDERED that defendants Van Lare and Lavine file an amended answer in conformity with this order within five (5) days after the date of its entry.

Filed August 1, 1974

ARNOLD BAUMAN
Hon. Arnold Bauman
U.S.D.J.

Amended Answer of State Defendants in *Hurley* v. *Van Lare*.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The state defendants answering the Amended Verified Complaint herein by their attorney, Louis J. Lefkowitz, Attorney General of the State of New York, respectfully allege upon information and belief:

1. Deny so much of paragraphs "1" and "2" as alleges that the constitutional claims raised are substantial enough to establish a cause of action under 42 U.S.C. § 1983 and to vest this Court with jurisdiction under 28 U.S.C. § 1343(3) and (4) and that any claim on behalf of welfare recipients to retroactive awards of public assistance benefits is authorized by 28 U.S.C. §§ 2201, 2202, Rule 57 of the Federal Rules of Civil Procedure and/or by 42 U.S.C. § 1983.

2. Deny so much of paragraph "3" as alleges that the constitutional claims alleged are substantial enough to warrant the convening of a three-judge court.

3. Deny so much of paragraphs "5" and "6" as alleges that a class action is proper in the premises and alternatively, if determined to be proper that said class is broader than all residents of the State of New York who are or will be receiving public assistance, and who have had their grants of public assistance reduced, terminate, suspended or denied or who may be threatened with reduction, termination, suspension or denial of public

assistance, solely because of the presence of a non-contributing lodger in the home pursuant to 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv).

4. Deny so much of paragraphs "7" and "8" as alleges that defendants Van Lare and Lavine are liable for suit in their individual capacities in this action.

5. Deny paragraph "14" except as it pertains to November and December of 1970 and January and February of 1971 and except as it alleges that plaintiff's male friend was not under any legal obligation to provide financial assistance or support to plaintiff or her children.

6. Deny paragraph "20" except as it alleges that the application of §§ 352.30(d) and 352.31(a)(3)(iv) affected a reduction of $120 in the amount of public assistance paid to plaintiff and her children over a four month period.

7. The state defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "21" except that said defendants deny that 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv) prevent plaintiff from associating with her male friend.

8. Deny so much of paragraph "22" as recites 18 N.Y.C.R.R. § 352.30(c) on the grounds that the section is not relevant to this action.

9. Deny each and every allegation in paragraphs "24", "25", "26", "27", and "28".

FACTUAL ALLEGATIONS

10. At all times relevant herein plaintiff Hurley has been and continues to be a recipient of public assistance

on the AFDC program on behalf of herself and her three minor children Doreen, Jamie and John.

11. From on or about December 8, 1969 until March 5, 1971, plaintiff Hurley and her children resided in a first floor apartment at 210 Hillside Avenue, Mount Vernon, New York, County of Westchester. Said apartment consisted of at least the following rooms: Living room, kitchen with dining area, three bedrooms, and bath. Plaintiff Hurley's actual rent was $150 per month. With the exception of the period of November and December 1970 and January and February 1971, discussed further below, Mrs. Hurley's AFDC unit received a shelter allowance equal to the actual rent. The applicable local maximum was $182 per month.

12. On March 5, 1971, Mrs. Hurley and her children moved from the Hillside Avenue address to 12 Wallace Avenue in Mount Vernon (then her parent's home) and on April 29, 1971, from the Wallace Avenue address to 90 Brookside Avenue, also in Mount Vernon. On or about November 1, 1973, Mrs. Hurley and her children moved to R.D. #1, Bloomingburg, New York, County of Sullivan.

13. On or about November 28, 1967 the Westchester County Department of Social Services provided Mrs. Hurley's public assistance unit with a grant of $718.50 pursuant to her request for the purpose of obtaining furniture.

14. During the months of November and December 1970, and January and February 1971, Mrs. Hurley's male friend (ADR) resided with her and her minor children. During this period of time, ADR continued to be employed but did not pay any portion of the shelter costs or contribute to the support of plaintiff or her children.

15. Upon being satisfied that the ADR was in fact residing with Mrs. Hurley at her apartment, Westchester County Social Services advised plaintiff that the public assistance unit's grant would be reduced by $35 per month with reference to the four month period aforesaid.

16. Mrs. Hurley sought a state "fair hearing" with respect to the reduction which was held on March 22, 1971. As a result of the decision thereon the Westchester County action was modified to conform with 18 N.Y.C.R.R. §§ 352.30 (d) and 352.31(a)(3)(iv) and a reduction of $30 per month (⅕ of $150 shelter allowance) was ordered with reference to the four month period.

17. After February 28, 1971, ADR ceased to reside with Mrs. Hurley and there has been no pro-rata reduction in her shelter allowance since that date.

AS AND FOR A FIRST DEFENSE.

18. The Court lacks subject matter jurisdiction because of the insubstantiality of the constitutional claims alleged.*

AS AND FOR A SECOND DEFENSE.

19. 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv) are consistent with federal law and the regulations promulgated pursuant thereto including 42 U.S.C. §§ 602(a)(7), (10) and 606 and 45 C.F.R. § 233.90.*

AS AND FOR A THIRD DEFENSE.

20. 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv) do not violate any of plaintiff's rights under the First Amend-

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* Previously argued and repeated herein only for completeness.

ment of the United States Constitution and/or any constitutional right to privacy.

AS AND FOR A FOURTH DEFENSE.

21. 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv) do not violate any of plaintiff's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

AS AND FOR A FIFTH DEFENSE.

22. 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv) do not violate any of plaintiff's rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

WHEREAS, the state defendants pray for judgment dismissing the complaint for want of jurisdiction or alternatively, declaring 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv) constitutional under the First and Fourteenth Amendments and for such other and further relief as the Court deems just and proper on the premises.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Van Lare and Lavine
By
s/ JUDITH A. GORDON
JUDITH A. GORDON
Assistant Attorney General

(Verified by Judith A. Gordon, August 12, 1974.)

Opinions of the Three-Judge District Court

• • •

Before HAYS, Circuit Judge, BAUMAN, District Judge, and WEINSTEIN, District Judge.

WEINSTEIN, District Judge:

Plaintiffs complain on behalf of a class of some 10,000 that the New York State regulations automatically reducing aid to families with dependent children (AFDC) (42 U.S.C. §§ 601-44) if the recipient houses a non-contributing "lodger" are unlawful both on constitutional and statutory grounds. Separate civil rights actions were brought in the Southern and Eastern Districts of New York. 42 U.S.C. § 1983; 28 U.S.C. § 1343(3); Fed. R. Civ. P. 23.

In each action the District Court sustained plaintiffs' statutory claim without considering the constitutional issues. *Hurley* v. *Van Lare,* 365 F. Supp. 186, (S.D.N.Y. 1973); *Taylor* v. *Lavine* (unreported), Slip Op. 73-C-699 (E.D.N.Y. 1973). The Court of Appeals reversed and remanded the cases "for the convening of a three-judge court to consider the constitutional issues. *Taylor* v. *Lavine,* —— F. 2d ——, ——, Slip Op. 73-2731 at p. 3470 (2d Cir. 1974).

The actions have been consolidated for consideration of the constitutional issues by a three-judge court. 28 U.S.C. §§ 2281, 2284. *Cf. Gaddis* v. *Wyman,* 304 F. Supp. 717, 720 (S.D.N.Y. 1969), *aff'd per curiam sub nom. Wyman* v. *Bowens,* 397 U.S. 49, 90 S. Ct. 813 (1970). It is urged that the New York State "lodger" regulations (1) create an irrebuttable presumption offensive to due process; (2) invade rights to privacy and free association; and (3) deny equal protection of the laws. For the reasons set forth below, we conclude that the regulations in question are unconstitutional.

The AFDC program was designed by Congress "to help maintain and strengthen life," and to encourage recipients "to retain . . . personal independence consistent with . . . care and protection" of dependent children. 42 U.S.C. § 601. As enforced, the state regulations are corrosive of these goals. The nation's generous spirit of concern for the poor, with its concomitant desire to equalize the developmental opportunity of a young generation impoverished, has been thwarted. Unless checked there is a clear tendency in such regulations as are before us to strip welfare recipients of the last vestiges of their sense of personal worth, to force them, in words used to describe a group existing on the edge of extinction, to "live on as a people without life, without passion, beyond humanity." C. M. Turnbull, THE MOUNTAIN PEOPLE 295 (Simon & Shuster Touchstone ed. 1972).

I. FACTS

A. CHALLENGED REGULATIONS

The federal AFDC program provides states with matching funds to assist the "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . .". 42 U.S.C. § 606(a). Among the New York regulations under which AFDC funds are distributed are the two challenged here--18 N.Y.C.R.R. § 352.30(d), which reduces a recipient's shelter allowance if the recipient houses a noncontributing "lodger," and 18 N.Y.C.R.R. § 352.31(a)(3)(iv), which treats a man living with a female recipient but not married to her as a "lodger." These regulations read:

> "*A non-legally responsible* [for support of the aided persons] relative or unrelated *person* in the household, who is not applying for nor receiving public assistance shall not be included in the budget and *shall be deemed to be a lodger* or boarding lodger. . . . *In the event a lodger does not contribute at least $15 per month, the family's shelter allowance* including fuel for heating, *shall be a pro rata share of the regular shelter allowance.*" 18 N.Y.C.R.R. § 352.30(d). [Emphasis added.]
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> • • •
>
> "When a female applicant or recipient is living with a man to whom she is not married . . . his available income and resources shall be applied in accordance with the following:
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> • • •
>
> "(iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(d)." 18 N.Y.C.R.R. § 352.31(a)(3).

Ostensibly New York enacted 18 N.Y.C.R.R. 352.30(d) pursuant to its duty under the federal AFDC program to determine a recipient's actual need by taking "into consideration any other income and resources of any child or relative claiming aid to familites with dependent children." 42 U.S.C. § 602(a)(8). Aimed as it is at preventing state welfare funds from going where they are not needed, the regulation makes two alternative irrebuttable presumptions. First, it presumes that a recipient family able to have a noncontributing lodger needs less housing space for its own use and consequently needs less money to pay for less space. The second alternative presumption is that a recipient family able to house a noncontributing lodger—even if the family could not reasonably subsist in less space

—somehow needs less money to pay its share of the rent. Apparently the rationale of this presumption is that the lodger could, should, and therefore would, pay his or her proper share of the rent if forced to by a reduction in the recipient family's shelter allowance, for it assumes—irrebuttably—that, at least if he is a male, a "lodger" has "available income and resources." 18 N.Y.C.R.R. § 352.31 (a)(3)(iv).

Under the regulations no hearing to determine if, or how, a reduction will adversely affect particular dependent minor children can be had. There can be no hearing to decide whether in any particular case the presumptions are contrary to the facts. Whether the "lodger" be a sister, a child, or adult companion who helps hold the family unit together, whether this "lodger" can or will contribute towards the rent, and whether the "lodger's" presence saves the state money are all undisputable under the regulations.

B. Those Affected by the Regulations

The backgrounds of the named plaintiffs have been sufficiently set forth in prior published opinions. *See* —— F. 2d —— (2d Cir. 1974); 365 F. Supp. 186 (S.D.N.Y. 1973). Local welfare agencies have reduced or are threatening to reduce the shelter allowances of AFDC recipients on the basis of these regulations: Mrs. Hurley and her three children from $150 to $115 because she lived with a man not her husband; Mrs. Taylor and her two children from $165 to $110 because she allowed her incapacitated sister to stay with her; and Mrs. Otey and her minor son from $145 to $96.65 because she allowed an adult unemployed son to sleep in the apartment.

Typical of the factual situations which welfare officials must ignore in applying the mechanical regulation is that related by Mrs. D, who testified at the trial. She and her

two minor children reside in Mount Vernon in an apartment characterized by Paul Davidoff, a distinguised urban planner, as "far below a modern standard for decent accommodations for a family of that size." They have received AFDC assistance for approximately the last six and one-half years. She has not seen or heard from her husband since July, 1965; when she attempted to obtain a divorce Legal Aid could not go forward with the case, she testified, because she could not afford necessary disbursements. Over the past six years Mrs. D has been hospitalized some dozen times for surgical and other treatment. Because of her illnesses and periods of convalescence, plaintiff has not been able to carry out many family and household functions; obviously she is not well and seems aged beyond her years.

A male friend of the family has taken up residence in the D household. During Mrs. D's periods of illness and convalescence, he took care of her and her children, shopped for food, washed the family's clothes, cooked the family's meals, cleaned the house and performed other household tasks. He, himself, has various disabilities including extreme high blood pressure and he is presently unable to work. He is under no legal obligation to support the family and, in fact, has provided no financial support. Because of his presence local welfare officials informed Mrs. D:

> "Quality control reports of 1/15/72 indicated that Mr. [M.] resides with you and your family. Therefore, we are pro-rating your rent ¾ of $175 = $131.40."

The proposed reduction in Mrs. D's public assistance grant would leave the mother and two children with insufficient funds to purchase those necessities of life—food and clothing—requisite for a minimum standard of living.

Whether the state would save money were the male to leave—or himself successfully apply for a welfare grant, as he probably could—is not clear. In view of the mother's

health, one of her social workers informed her that she would be entitled to homemaker and other assistance. The effect on the children, who now refer to the man as "daddy," of his leaving certainly cannot be assumed to be beneficial.

Mrs. D's case is illustrative of many situations where a mother on welfare houses a noncontributing adult male companion. The poor do not necessarily cohabit on a bed of roses. In the D's case the two sickly adults and two young children abandoned by their father live in substandard accommodations and use broken furniture—purchased from a company to which Mrs. D had been steered by a welfare worker; and the children and mother receive a bare subsistence allotment for food and other necessities.

D's case was put in perspective as typical by Professor Herbert Gans of Columbia University, whose work in the sociology of the poor is well known and highly regarded. He described the reason for the prevalence of such arrangements among the poor as follows:

> ". . . Poor people often live a very insecure existence, not only in terms of the amount of money they have, but the uncertainties about how long they will have it. . . .
>
> "So, quite frequently you do get a pattern among poor people, if they can't work or they can't find work either temporarily or permanently, of moving in with a relative, either temporarily or permanently, because there simply isn't any money to establish or to continue to maintain one's own household. And typically, then, the people then become lodgers, help out in the family in various ways in lieu of paying rent, helping to raise the children, taking care of the house, doing a variety of things. I think that's one major explanation.
>
> "There are poor people who either feel that their poverty is temporary and don't want to go on welfare, don't want to get involved with being on welfare—welfare itself is a full-time job quite often—you know, filling out of the forms, dealing with the regulations, dealing with the social workers and the case workers, and what have you, and so they simply say we are not going to go on welfare and hope perhaps their problem is temporary. Other people . . . just . . . have the pride of independence, as it is sometimes called, and say they want to make it on their own however that is going to be."

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This "doubling up phenomenon among poor people . . . is particularly [prevalent] . . . where the head of the household is a woman." He went on to add:

> ". . . where there is poverty and insecurity people get very dependent on each other to tide them over during crises, so that you have, and this has been found in studies all over the world among poor people . . . [,] a very generous extension of help and hospitality to others, relatives and close friends.
>
> "And this exists not because poor people are necessarily more altruistic or more generous than other people, but because this is really the only way you can survive in a crisis. If you don't have somebody who you can rely on to bail you out with a couple of dollars to get you to the hospital, if one of your kids suddenly gets sick, to provide you a room if your landlord evicts you or if your building burns down or becomes uninhabitable, if this ability to call on somebody for help is not available, then survival for the poor is much more risky. And so what happens is you get a pattern of mutual help, of mutual obligation, people helping

each other because they know if they help somebody when they have a problem they will be helped in return.

"One part of this helping phenomenon is people making room in their house for somebody who is in need of shelter temporarily or permanently, and again only in this case on the grounds that if I don't do it for him or her now, he won't do it for me when I am faced with that problem."

As Dr. Gans pointed out, "This is a very important phenomenon that middle class people don't do much of and don't understand."

It is this need for mutual help that explains, Dr. Gans noted, why housing, which is already inadequate, is shared with others:

". . . especially [in] the New York area, they get small apartments with small rooms, if they are [on] Welfare . . . so they live in a minimum space to begin with.

"When somebody else comes in they become more crowded, obviously. But the exchange—they make this sacrifice because again this is a perfect example of obligation of mutual help that I discussed earlier. You make a sacrific because then you obligate the other person to help you when you are in need."

The effect of enforcing regulations such as we have before us is to force the man out of the house. As Dr. Gans testified:

". . . divorce has always been very difficult for the poor to get because (a) it costs money to get divorced, (b) it costs money to get a lawyer, until recently it was impossible for poor people to get free legal help, so

that there has been a long tradation of simply physical separation but no divorce."

• • •

". . . I am talking generally [about] what happens in the poor community.

"Quite often the relationship between men and women is a very fragile one, particularly when the men are . . . economically marginal in society and told that they are not useful economically, (a) the men don't have much money, (b) their egos are very sensitive and they might just say well, if you ask me to pay I will just move out on you and that would be the end of—in essence, the relationship would be sacrificed to whatever the rental money was.

". . . if the lodger is a man who is living with a woman, he becomes a lodger to serve a variety of functions in the family, helping raise the children, taking care of the house, I think the relationships are such that if the woman asked him for money, in most cases he doesn't have it, even if he had it he might say well, if you put it on that basis, I will just move out and then the woman is deprived of the relationship with the man which is part of life and of the fatherly functions that this kind of lodger often performs."

II. The Law

A. The Due Process Claim

As the Supreme Court again noted this Term in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 644, 94 S. Ct. 791, 798 (1974), declaring invalid a presumption that pregnant women were incapacitated from teaching, "'permanent, irrebutable presumptions have long

been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments.'" There is no warrant for automatic denial of a right on the basis of an irrebutable presumption, "when that presumption is not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination." *Vlandis* v. *Kline,* 412 U.S. 441, 452, 93 S. Ct. 2230, 2236 (1973) (irrebuttable presumption of nonresidency of student invalidated). *See also, e.g., United States Dep't of Agriculture* v. *Murry,* 413 U.S. 508, 93 S. Ct. 2832 (1973) (denying food stamp eligibility on basis of irrebuttable presumptions of lack of need unconstitutional); *Stanley* v. *Illinois,* 405 U.S. 645, 92 S. Ct. 1208 (1972) (irrebuttable presumption preventing unwed father's custody of child violative of due process); *Stewart* v. *Wohlgemuth,* 355 F. Supp. 1212 (W.D. Pa. 1972) (irrebuttable presumption terminating welfare benefits of college students violative of due process); *Owens* v. *Parham,* 350 F. Supp. 598 (N.D. Ga. 1972) irrebuttable presumption reducing shelter allowance on ground members of household bear pro rata share of expenses violative of due process); *Boucher* v. *Minter,* 349 F. Supp. 1240 (D. Mass. 1972) (irrebuttable presumption terminating shelter allowance where stepfather lives in same house violative of due process).

1. The Presumptions Relied Upon by the State

A. *Less space needed if "lodger" present.*

The presumption that a recipient family able to house a noncontributing lodger needs less space for its own use "is not necessarily or universally true in fact." The lodger may be an older child sharing a single or bunk bed with a younger sibling, or a disabled relative sleeping on the couch. If the lodger is the mother's adult male companion,

he may be sharing the mother's own bed. None of these plausible factual circumstances fairly imply that the family could realistically subsist in less space.

Moreover, even if we were to assume that a family able to house a noncontributing lodger needs less space for its own use, under present conditions many families could not locate habitable smaller quarters. Plaintiffs' housing expert, Mr. Paul Davidoff, gave uncontradicted testimony that in the New York City metropolitan area, the poor live in housing that is predominantly substandard and inadequate in terms of space, and that, therefore, it is highly unlikely that a family on welfare could find and move into a liveable smaller apartment.

The almost zero vacancy rate for low-rental housing in large parts of New York State supports Mr. Davidoff's conclusion. *See, e.g., Talbot* v. *Romney,* 321 F. Supp. 458, 470 (S.D.N.Y. 1970) (vacancy rate drop from 3.2% in 1965 to 1.2% in 1968); *Parkwood Realty Co.* v. *Marcano,* 353 N.Y. Supp. 2d 623, 625 (N.Y.C. Civ. Ct. 1974); 1970 Census of Housing, Detailed Housing Characteristics: New York 34-167, 34-171; State of New York, Executive Department, Division of Housing and Community Renewal, Survey Report on Rental Housing 3 (1969); J. C. Lynn, Recent Housing Trends in Westchester County 7, 8 (Westchester Planning Occasional Papers, Winter 1974); Report on Housing and Rents of the Temporary State Commission on Living Costs and the Economy 72-73 (1974); Economic Consultants Organization, Inc., Residential Analysis for Westchester County, Growth of Demand and Supply: 1970-1990, Interim Report No. 3, 50 (1970); Interim Report No. 5, 47 (1970). Low cost housing available to welfare recipients is further constricted by negative community attitudes toward minority groups and subsidized housing (Interim Report No. 5; *supra,* at p. 47; Interim Report No. 3, *supra,* at pp. 3-4) and the

lack of institutional financing available for buildings currently housing recipients. City of New York, THE URBAN HOUSING DILEMMA: THE DYNAMICS OF NEW YORK CITY'S RENT CONTROLLED HOUSING 551-53 (Prel. undated). Negative attitudes of landlords and apartment owners toward public assistance recipients also limits availability. City of New York, THE URBAN HOUSING DILEMMA, *supra,* at pp. 555-56, 564-66.

The welfare recipient is put at more of a disadvantage in the ever shrinking housing market since she or he lacks "contacts" and entries into the market system. Fewer than 10% of recipients obtain housing through the Department of Social Services in Westchester County. INTERIM REPORT No. 7 (1970), *supra,* at pp. xii, 101. "Urban renewal and construction of public housing have had little impact on the number of units available to low income households. In most instances, new units built merely replace existing units removed from the stock." INTERIM REPORT No. 3, *supra,* at p. 3. The long waiting lists for public housing are well known.

It is apparent, therefore, that even if a family housing a noncontributing lodger could subsist without the lodger in a smaller apartment, the family probably could not locate decent smaller quarters. In that event, the family's rental expenses would remain as high as they were before the lodger came; there would be no dimunition of financial need.

If not for the challenged regulations and the irrebuttable presumptions they make, we would have thought it beyond debate that a family on public assistance might choose to house a non-contributing lodger for many reasons other than the presumed excess of living space. For example, a recipient might agree out of familial kindness and generosity to shelter a family member or relative who might otherwise suffer. Or a lonely mother raising her fatherless children might house a friend out of a deep, human

need for supportive, adult companionship. A welfare regulation encouraging a woman in Mrs. D's circumstances to remove her "lodger" exacerbates the familial disintegration already experienced by the urban poor.

In short, the presumption that a recipient family able to house a non-contributing lodger needs less space for its own use is neither necessarily nor univerally true in fact. The evidence before us shows it has no basis in fact for many AFDC families.

B. *Less financial need where "lodger" present.*

Similarly, the second, alternative, presumption that a recipient family able to house a noncontributing "lodger" —even if the family does not *ipso facto* need less space for its own use—needs less money to pay its own, *pro rata,* share of the rent is neither necessarily nor universally true. Unless the lodger pays a "share" of the rent, the family's rental expenses are not affected by the "lodger's" presence.

But the state may not conclusively presume that a lodger will pay his share of the rent, under the compulsion of a reduced shelter grant, merely because ethically he should or theoretically he could. *See* R. M. O'Neil, THE PRICE OF DEPENDENCY 253-254 (1970) (reasons why many people eligible for relief do not seek it); F. F. Piven & R. A. Cloward, REGULATING THE POOR 165 (Vintage ed. 1972) ("degradation at the hands of relief officials . . . deters actual or potential workers from seeking aid."). "[F]ederal law prohibits a conclusive presumption of support." *Taylor* v. *Lavine,* —— F. 2d ——, —— Slip Op. 73-2731 at p. 3477 (2d Cir. 1974). We know from the evidence before us that some AFDC family "lodgers" do not pay anything towards rent.

Certainly "the state has reasonable alternative means of making the crucial determination" (*Vlandis* v. *Kline,* 412

U.S. 441, 452, 93 S. Ct. 2230, 2236 (1973)) as to space and contribution where a lodger is present or believed present. That alternative means is the "Fair Hearing," a proceeding provided by 18 N.Y.C.R.R. § 358.1-21 to review the reduction of AFDC grants.

Making these individualized determinations may not completely serve the cause of "administrative efficiency but as the Supreme Court stated in *Stanley* v. *Illinois,* 405 U.S. 645, 656, 92 S. Ct. 1208, 1215 (1972):

> "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." (Footnote omitted.)

See also Cleveland Board of Education v. *LaFleur,* 414 U.S. 632, 646, 94 S. Ct. 791, 799 (1974).

Irrebuttable presumptions are offensive to due process because they effectively deny an individual the essential procedural right to challenge the purported factual basis of a determination adversely affecting his own liberty or property. In this case the "property" right in question is the AFDC recipient's statutory entitlement to a shelter allowance commensurate with actual need. Thus the rule against irrebuttable presumptions is an aspect of procedural, not substantive, due process. *See Vlandis* v. *Kline,* 412 U.S. 441, 455, 93 S. Ct. 2230, 2238 (1973) (Marshall, J., concurring, joined by Brennan, J.); *see also* Note, The Supreme Court, 1972 Term, 87 Harv. L. Rev. 57, 70 n. 21 (1973); *cf. Bell* v. *Burson,* 402 U.S. 535, 91 S. Ct. 1586 (1971); *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S. Ct., 1011 (1970).

Before reducing the shelter allowance of a recipient famiy because the family houses a noncontributing lodger, the state must make an individualized determination of whether the presence of the lodger does *in fact* diminish the family's shelter needs. If presumptions are used they must be rebuttable. *See* Proposed Federal Rules of Evidence 301, promulgated by the Supreme Court but not yet effective. This constitutionally required result is consistent with the statutory mandate of the federal AFDC program. *See, e.g., Shea* v. *Vialpando,* —— U.S. ——, 94 S. Ct. 1746 (1974); *Lewis* v. *Martin,* 397 U.S. 552, 90 S. Ct. 1282 (1970); *King* v. *Smith,* 392 U.S. 309, 88 S. Ct. 2128 (1968); *Hausman* v. *Dep't of Institution & Agencies,* 64 N.J. 203, 314 A. 2d 362, *cert. denied,* —— U.S. ——, ——, S. Ct. —— (1974); *Rosen* v. *Hursh,* 464 F. 2d 731 (8th Cir. 1972); *Mothers and Childrens Rights Org., Inc.* v. *Stanton,* 371 F. Supp. 298 (N.D. Ind. 1973); *Gaither* v. *Sterrett,* 346 F. Supp. 1095 (N.D. Ind.), *aff'd,* 409 U.S. 1070, 93 S. Ct. 688 (1972); *X* v. *McCorkle,* 333 F. Supp. 1109 (D.N.J. 1970); *aff'd per curiam sub nom. Engelman* v. *Amos,* 404 U.S. 23, 92 S. Ct. 181 (1971); *Gilliard* v. *Craig,* 331 F. Supp. 587 (W.D.N.C. 1971), *aff'd,* 409 U.S. 807, 93 S. Ct. 39 (1972), *reh. denied,* 409 U.S. 1119, 93 S. Ct. 892 (1973); *Jenkins* v. *Georges,* 312 F. Supp. 289 (W.D. Pa. 1969); *Solman* v. *Shapiro,* 300 F. Supp. 409 (D. Conn.), *aff'd,* 396 U.S. 5, 90 S. Ct. 25 (1969); *Battle* v. *Lavine,* 44 App. Div. 2d 307, 354 N.Y.S. 2d 680 (2d Dep't 1974). *See also* 45 C.F.R. 233.20(a)(1); 233.20(a)(3)(ii); and 233.90(a).

III. Other Claims

A. Anomaly in Regulation

Under state administrative interpretations section 352.30(d) requires a "lodger" to contribute only $15.00

per month to the recipient family's rent; it does not require the lodger to pay a "pro rata share" of the rental. To encourage the taking in of rent-paying lodgers the first $15.00 of lodger income is, under the regulation, ignored. As one of the state's witnesses admitted, the New York statutory lodger policy achieves this anomalous result: if a lodger pays $15.00 per month, the recipient family has nothing deducted from its shelter allowance; but if the lodger pays less than $15.00 or nothing at al, the family has a full, pro rata share of its shelter allowance—in some of the instances before us as much as $50.00—deducted.

The head of a household on welfare might the witness conceded, avoid the impact of § 352.30(d) altogether by loaning a lodger $15.00 per month to enable him to make a $15.00 rental contribution and then later cancelling the loan if it was not repaid. Generally, however, welfare families are not skilled in the art of self-interested financial manipulation. The possibility, therefore, that all members of the class might evade the regulation does not make it illusory and has no effect on its invalidity.

B. Sex Discrimination

It is not clear that New York's statutory lodger policy makes a distinction on the basis of sex. While § 352.31(a)(3)(iv) is limited by its terms to a "male" lodger, this section is apparently superfluous. Section 352.30(d) speaks of a "non-legally responsible relative or unrelated *person*" (emphasis added); this section, standing alone, presumably would apply to a female living with but not married to a father-recipient no less than a male living with but not married to a mother-recipient.

C. Free Association and Privacy

The State of New York is entitled—and as a participant in the federal AFDC program is under a duty to determine actual need in granting welfare, including shelter assistance. Inquiring whether a lodger's presence in fact indicates a diminished need for shelter assistance is hardly a violation of plaintiffs' rights. The constitutionally protected rights of free association and privacy do not compel the states to misallocate their scare welfare resources. The problem with the regulations under challenge here is not that they somehow invade rights of free association or privacy, but that they do not determine *actual* needs; rather they proceed on the basis of irrebuttable presumptions neither necessarily nor universally true in fact. Only if the challenged regulation sought to prescribe plaintiffs' familial or sexual life style, would the free association-privacy claim merit further consideration. *See United States Dep't of Agriculture* v. *Moreno*, 413 U.S. 528, 93 S. Ct. 2821 (1973).

D. Equal Protection

Plaintiffs also claim that the challenged regulations deny them equal protection of the laws. The challenged regulations distinguish between two groups of welfare recipients: those who house a non-contributing lodger and those who do not. The purported objective of this distinction is a constitutionally appropriate one since, as we have pointed out, New York may seek to allocate its scarce welfare resources where they are most needed. The related issue of whether there is a factual basis making at least rational the legislative judgment that families housing noncontributing lodgers have a diminished need for shelter allowance, must be resolved by individualized determinations in accordance with the mandate of due process. In the circumstances of this case, the equal protection claim overlaps analytically with the due process claim. It is, therefore, unnecessary to articulate a separate equal protection ground of decision.

E. Mootness

Since the controversy affects many AFDC families and this is a class action, there is no need to decide whether a particular named plaintiff is still being adversely affected by the challenged regulations. *Taylor* v. *Lavine,* —— F. 2d ——, —— n. 3, Slip Op. 2731 at 3473 n. 3 (2d Cir. 1974). Where there are numerous class members who suffer the same harm complained of by the named plaintiffs, or who are subject to like treatment in the future, the action does not become moot as to them and there remains a justiciable controversy. *See, e.g., Richardson* v. *Ramirez,* —— U.S. ——, —— S. Ct. ——, Slip Op. 72-1589 at pp. 14-15 (1974); *Johnson* v. *New York State Education Dep't,* 409 U.S. 75, 76, 93 S. Ct. 259, 260-61 (1972) (Marshall, J., concurring); *Jenkins* v. *United Gas Corp.,* 400 F. 2d 28 (5th Cir. 1968); *Steinberg* v. *Fusari,* 364 F. Supp. 922, 928 (D. Conn. 1973), appeal pending, —— U.S. ——, 94 S. Ct. 1406 (1974).

IV. Conclusion

Section 18 N.Y.C.R.R. § 352.30(d) and § 352.31(a)(3)(iv) are invalid to the extent stated in this opinion. The parties shall settle an order on forty-eight hours notice.

So ordered.

Dated: New York, New York, August 5, 1974.

Jack B. Weinstein
Arnold Bauman

Hays, *Circuit Judge,* dissenting:

I dissent.

The challenged regulation, 18 N.Y.C.R.R. § 352.30(d), is not unconstitutional. It sets up no "irrebutable presumption . . . not necessarily or universally true in fact." *Vlandis* v. *Kline,* 412 U.S. 441, 452 (1973).

In *Taylor* v. *Lavine,* Docket No. 73-2731, slip op. at 3465 (2d Cir. 1974), the Second Circuit considered the validity of section 352.30(d) in light of section 406 of the Social Security Act, 42 U.S.C. § 606(a) (1970), and 45 C.F.R. § 233.90(a). In *Taylor* the court held that section 352.30(d) does not create an irrebuttable presumption of contribution offensive to section 406(a) or the federal regulation.[1] It reasoned that prorating shelter costs between AFDC-eligible and non-eligible members of a household insures that AFDC funds are disbursed only to individuals who have demonstrated their need for assistance. It found that the New York regulation is reasonably justified by considerations such as the severability of individual needs, the divisibility of space, and the economies of scale that result from combining small living units into larger groups:

> "Prorating housing costs between the recipient and non-recipient simply reflects the separability of the need of the AFDC-eligible family members from the needs of persons who have not demonstrated their eligibility for public assistance. Indeed, if a section 352.30(d) lodger can separately demonstrate his eligibility for public aid, the AFDC shelter allowance is increased to include his share. . . ." *Taylor* v. *Lavine,* Slip op. at 3477-78.

The *Taylor* holding controls the present case. A noncontributing lodger, like the majority's Mr. M., must by necessity either have the means to make a pro rata contribution to the recipient household, or he must lack such means. If the lodger is financially able to contribute to the cost of maintaining the household, New York surely does not offend due process by abating the shelter allowance of the AFDC recipient pro rata according to the lodger's share. If the lodger is not financially able to contribute his share, New York permits him to establish his separate eligibility for public assistance. We have been assured that New York does not require persons of demonstrated need to go without shelter. Should the lodger establish his eligibility, it is admitted by all parties that a household like the Mrs. D-Mr. M. household would receive a shelter allowance increased over the amount received by the D household alone.[2]

It is thus clear that the New York regulation "presumes" that a lodger has the will and means to contribute his or her fair share toward housing expenses unless the lodger demonstrates separate eligibility for public assistance. Any "presumption" of the lodger's means may be refuted at the lodger's initiative in the same forum in which the AFDC recipient was initially required to establish a need for aid. The "conclusive presumption" denounced by the majority is the same "presumption" that attaches to every member of our society: that he is able to pay his own way until and unless he demonstrates the contrary. If the lodger is eligible for public assistance but does not apply, his silence cannot be put at the state's door. If the lodger is too proud to accept welfare—Mrs. D's testimony indicates that such was Mr. M's motive for not applying for aid—then he ought to be too proud to accept aid from the state indirectly through the eligible AFDC recipient. A

noncontributing lodger like Mr. M. has and eats his public assistance cake without demonstrating his need.

The majority states that the aid recipient's "Fair Hearing" under 18 N.Y.C.R.R. §§ 358.1-358.27 is a "reasonable alternative means" for determining the amount a lodger is willing or able to pay toward the cost of housing. But this statement glosses over the obvious difficulty of determining the meaning or intent of a person who has not put his affairs before the Social Services Department by applying for public assistance. In none of the recent Supreme Court due process cases cited by the majority did the reasonable alternative means of factfinding entail intrusion into the affairs of any person who did not apply for or seek a governmentally administered benefit or right.

Section 322.30(d) does not "exacerbate [ ] the familial disintegration already experienced by the urban poor." It does not necessarily upset the established patterns of cooperation between people of limited and uncertain means. So long as each member of a group cooperating as a household establishes his eligibility for public funds, cooperating will increase the shelter allowance due the whole. In any event, the procedure implicitly sanctioned by the majority, requiring the lodger to submit his affairs to the New York Social Services Department in the context of the AFDC recipient's "Fair Hearing," is surely no less conducive to "familial disintregation" than requiring the lodger to demonstrate his need on his own application.

While assailing the rationality of section 352.30(d), today's majority embraces irrationality. It creates a unique class of persons who may receive the benefit of state aid without demonstrating any need for such aid. It prefers lodgers in AFDC recipient households over all other lodgers. It prefers lodgers in AFDC households

over the eligible AFDC recipients themselves, since the latter must bear the burden of demonstrating their eligibility. In our complex society there are no simple means of identifying households in need of state assistance, or of allocating the limited stock of resources among individuals who have demonstrated a need for such assistance. Section 352.30(d) is a valid attempt by New York to make such an allocation and it ought to be upheld.

FOOTNOTES

1. The *Taylor* court remanded the case so that the constitutional issues might be considered by a three-judge district court. The present case is the result of that remand. The opinion of the present majority ignores the *Taylor* rationale and in effect holds that section 406(a) of the Social Security Act and 45 C.F.R. § 233.90(a) are unconstitutional as applied in the Second Circuit.

2. Under locally administered regulations, shelter allowances increase in rough proportion to the number of eligible persons in the recipient household. Were Mr. M. to establish his eligibility for public assistance there would be an additional eligible person in the household, and the shelter allowance would accordingly be increased.

Judgment and Order.

[SAME TITLE]

This cause coming on to be heard upon remand from the United States Court of Appeals for the Second Circuit sub nom. *Taylor* v. *Lavine* for the convening of a three-judge district court pursuant to 28 U.S.C. §§ 2281 and 2284 to hear and determine plaintiffs' constitutional claims, and a consolidated three-judge court having been convened, and the plaintiffs having moved for a class action determination pursuant to Rule 23 of the Federal Rules of Civil Procedure and for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and motions to intervene as parties plaintiffs having been made pursuant to Rule 24 of the Federal Rules of Civil Procedure on behalf of Phyllis D'Alessio and Loretta Clark in *Hurley* v. *Van Lare*, and by Francesca Aloise in *Taylor* v. *Lavine*, and defendants Lavine and Van Lare having moved to dismiss the actions pursuant to Rule 12 of the Federal Rules of Civil Procedure or in the alternative for summary judgment, and the defendants not opposing plaintiffs' motion for a class action determination, and the three-judge court on June 26, 1974 having heard testimony and considered the evidence pursuant to Rule 43(e) of the Federal Rules of Civil Procedure, and having heard the argument of the attorneys for the parties herein, and the three-judge court having considered the evidence, memoranda of law, and due deliberation having been had, and upon the filing of the opinion of the three-judge court dated and filed the 5th day of August, 1974, and Circuit Judge Hays having filed a dissenting opinion, it is hereby

ORDERED that defendants' motions to dismiss the action or in the alternative for summary judgment be and the same hereby are denied, and it is further

Judgment and Order.

ORDERED that the above entitled consolidated actions are maintainable as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class of plaintiffs consists of all residents of the State of New York who are or were or will be receiving public assistance, and who have had their grants of public assistance reduced, terminated, suspended or denied, or who are or may be threatened with the reduction, termination, suspension or denial of public assistance solely because of the presence of a "lodger" in the home pursuant to 18 N.Y.C.R.R. §§ 352.31(a)(3)(IV) and 352.30(d); and it is further

ORDERED that plaintiffs' motion for summary judgment be and the same is granted to the extent hereinafter set forth; and it is further

ORDERED that defendants, their officers, agents, servants, employees, and successors be and hereby are permanently enjoined from enforcing 18 N.Y.C.R.R. §§ 352.31(a)(3)(IV) and 352.30(d) and from terminating, suspending or reducing grants of public assistance because of the presence in the home of a family receiving public assistance of a person who is not a recipient of public assistance and who has no legal obligation to support the public assistance family; and it is further

AB

~~ORDERED that plaintiffs' claims for retroactive welfare benefits that resulted from the enforcement of 18 N.Y.C.R.R. §§ 352.31(a)(3)(IV) and 352.30(d) be and the same hereby are remanded to defendants who are directed to establish a procedure for their consideration and determination; and it is further~~

Judgment and Order.

ADJUDGED AND DECREED that plaintiffs are entitled to and are hereby granted a declaratory judgment in this action that 18 N.Y.C.R.R. §§ 352.31(a)(3)(IV) and 352.30(d) and defendants' policy and practice of terminating, suspending or reducing grants of public assistance because of the presence in the public assistance family's home of a person who is not a recipient of public assistance and who has no legal obligation to support the public assistance family, violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Dated: New York, New York
August 15, 1974.

/s/ ARNOLD BAUMAN
/s/ JACK B. WEINSTEIN

Judgment Entered:
August 15, 1974.

.....
Clerk

State Defendants' Notice of Appeal to the Supreme Court of the United States.

[SAME TITLE]

Sirs:

Please Take Notice that the defendants Barry Van Lare and Abraham Lavine hereby appeal to the Supreme Court of the United States from the Judgment and Order of the three-judge district court (Hayes, C.J. dissenting) dated the 15th day of August, 1974 and entered in the office of the Clerk of the United States District Court, Southern District of New York, on the same day which declared the action to be maintainable as a class action, permanently enjoined the enforcement of 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv) to the extent that said regulations authorize the termination, suspension or reduction of grants of public assistance solely because of the presence of a lodger and non-recipient in the home of a public assistance recipient and declared said regulations unconstitutional to the same extent, and the said defendants hereby appeal from each and every part of said Judgment and Order as well as the whole thereof.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York
August 20, 1974

Yours, etc.,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Defendants
By: Judith A. Gordon
Assistant Attorney General
Office and P.O. Address
Two World Trade Center
New York, New York 10047

State Defendants' Notice of Appeal to the Supreme Court of the United States.

To: Martin Schwartz, Esq.
Westchester Legal Aid Society
Attorney for Plaintiff Hurley
56 Grand Street
White Plains, New York 10601

Leonard S. Clark, Esq.
Nassau County Law Services Committee, Inc.
Attorney for Plaintiffs Taylor and Otey
285 Fulton Avenue
Hempstead, New York 11550

Hon. Gerald Harris
Westchester County Attorney
Attorney for Defendant Louis P. Kurtis
County Office Building
148 Martin Avenue
White Plains, New York 10601

Hon. John F. O'Shaughnessy
Nassau County Attorney
Attorney for Defendant Shuart
1 West Street
Mineola, New York 11501

Filed August 20, 1974

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-453

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants,

-against-

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Appellees.

ABE LAVINE, individually and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Appellants,

-against-

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Appellees.

APPELLEES' MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The appellees in the above captioned action ask leave to file their Motion to Affirm the Judgment and Order of the three-judge district court and to proceed on appeal in forma pauperis pursuant to Supreme Court Rule 53 and 28 U.S.C. §1915.

The appellees' affidavits in support of this motion are annexed hereto.

Dated: November 6,1974

Martin A. Schwartz

THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY
By: Martin A. Schwartz, of Counsel
Lawrence S. Kahn, of Counsel
56 Grand Street
White Plains, New York 10601
Tel. (914) 761-9200

NASSAU COUNTY LAW SERVICES
COMMITTEE, INC.
By: Leonard S. Clark, Esq.
285 Fulton Avenue
Hempstead, New York 11550
Tel. (516) 292-8100

Counsel for Appellees

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-453

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants,

-against-

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Appellees.

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Appellants,

-against-

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Appellees.

AFFIDAVIT

I, MARTIN A. SCHWARTZ, being first duly sworn according to law, depose and say in support of appellees' motion for leave to proceed in forma pauperis:

1. I am of counsel to The Legal Aid Society of Westchester County, attorney for appellees in the above entitled appeal. I am also counsel for petitioners in the related matter, Taylor, et al. v. Lavine, et al., Docket No. 74-5054, Petition for Writ of Certiorari filed in this Court on or about August 2, 1974. I am fully familiar with all of the proceedings herein and have personal knowledge of all of the facts set forth in this affidavit. I make this affidavit in support of appellees' motion to proceed in forma pauperis.

2. The named appellees herein and the class of persons they represent are all recipients of public assistance. They are represented by The Legal Aid Society of Westchester County and Nassau County Law Services, Inc., both of which are funded by the Office of Economic Opportunity to provide legal services to low income persons.

3. On or about August 2, 1974, appellees herein filed a Petition for a Writ of Certiorari sub nom. Taylor, et al. v. Lavine, et al., Docket No. 74-5054. Appellees herein, who are also the petitioners in Taylor, filed with their Petition for a Writ of Certiorari a Motion for Leave to Proceed In Forma Pauperis, supported by the affidavits of appellees Annie Taylor, Charlotte Otey and Rose Hurley. The originals of these affidavits are thus presently on file with this Court. A copy of these affidavits are annexed hereto in support of the instant motion to proceed in forma pauperis.

Appellees respectfully request that these affidavits of Annie Taylor, Charlotte Otey and Rose Hurley be considered in support of the instant motion of appellees to proceed in forma pauperis.

Martin A. Schwartz

Sworn to before me this
1st day of November, 1974

John T. Hand
Notary Public

JOHN T. HAND
Notary Public, State of New York
No. 60-6751100
Qualified in Westchester County
Term Expires March 30, 1976

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. _____

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR, CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Petitioners,

-against-

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, JAMES M. SHUART, individually and in his capacity as Commissioner of the Nassau County Department of Social Services, BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, and LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Respondents.

AFFIDAVIT

I, ANNIE TAYLOR, being first duly sworn according to law depose and say, in support of my motion for leave to proceed in forma pauperis and without being required to prepay costs or fees:

1. I am one of the petitioners in the above entitled case.

2. I am represented in this proceeding by Nassau County Law Services Committee, Inc., an organization funded by the Office of Economic Opportunity to provide legal services to low income persons.

3. Because of my poverty, I am unable to pay the costs of said cause.

4. I am unable to give security for the same.

5. I believe that I am entitled to the redress I seek in said cause.

6. The nature of said cause is briefly stated as follows:

> The decision of the United States Court of Appeals for the Second Circuit, which upheld the validity of New York regulations which cause a pro-rata reduction of the shelter allowance of AFDC recipients because of the presence of a non-legally responsible person in the home, violates my rights guaranteed by the federal Social Security Act and implementing regulations of the United States Department of Health, Education and Welfare.

Annie Taylor
ANNIE TAYLOR

Duty witnessed and sworn to before me, a Notary Public, this 19th day of July, 1974.

Leonard S. Clark
Notary Public

LEONARD S. CLARK
Notary Public, State of New York
No. 30-0150000
Qualified in Nassau County
Commission Expires March 30, 19__

Notary Public, State of New York
No. 30-5150000
Qualified in Nassau County
Commission Expires March 30, 1975

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. _____

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR, CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Petitioners,

-against-

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, JAMES M. SHUART,. individually and in his capacity as Commissioner of the Nassau County Department of Social Services, BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, and LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Respondents.

AFFIDAVIT

I, CHARLOTTE OTEY, being first duly sworn according to law depose and say, in support of my motion for leave to proceed in forma pauperis and without being required to prepay costs or fees:

1. I am one of the petitioners in the above entitled case.

2. I am represented in this proceeding by Nassau County Law Services Committee, Inc., an organization funded by the Office of Economic Opportunity to provide legal services to low income persons.

3. Because of my poverty, I am unable to pay the costs of said cause.

4. I am unable to give security for the same.

5. I believe that I am entitled to the redress I seek in said cause.

6. The nature of said cause is briefly stated as follows:

> The decision of the United States Court of Appeals for the Second Circuit, which upheld the validity of New York regulations which cause a pro-rata reduction of the shelter allowance of AFDC recipients because of the presence of a non-legally responsible person in the home, violates my rights guaranteed by the federal Social Security Act and implementing regulations of the United States Department of Health, Education and Welfare.

Charlotte Otey
CHARLOTTE OTEY

Duty witnessed and sworn to before me, a Notary Public, this 19 day of July, 1974.

Notary Public — RICHARD S. CLAUK
Notary Public, State of New York
No. 30-0650900
Qualified in Nassau County
Commission Expires March 30, 1975

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. _____

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR, CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Petitioners,

-against-

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, JAMES M. SHUART,. individually and in his capacity as Commissioner of the Nassau County Department of Social Services, BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, and LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Respondents.

AFFIDAVIT

I, ROSE HURLEY, being first duly sworn according to law depose and say, in support of my motion for leave to proceed in forma pauperis and without being required to prepay costs or fees:

1. I am one of the petitioners in the above entitled case.

2. I am represented in this proceeding by The Legal Aid Society of Westchester County, an organization funded by the Office of Economic Opportunity to provide legal services to low income persons.

3. Because of my poverty, I am unable to pay the costs of said cause.

4. I am unable to give security for the same.

5. I believe that I am entitled to the redress I seek in said cause.

6. The nature of said cause is briefly stated as follows:

> The decision of the United States Court of Appeals for the Second Circuit, which upheld the validity of New York regulations which cause a pro-rata reduction of the shelter allowance of AFDC recipients because of the presence of a non-legally responsible person in the home, violates my rights guaranteed by the federal Social Security Act and implementing regulations of the United States Department of Health, Education and Welfare.

Rose Hurley

ROSE HURLEY

Duty witnessed and sworn to before me, a Notary Public, this 12th day of July, 1974.

Susan H. Bennett

Notary Public

[illegible]
Notary Public, State of New York
Sullivan County Clerk's # 1240
Commission Expires March 30, 1976

IN THE

SUPREME COURT OF THE UNITED STATES

Octber Term, 1974

No. 74-453

BARRY VAN LARE, et al., Petitioners, -against- ABE LAVINE, et al., Respondents.	:	AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) SS:

Susan Loss, being duly sworn, deposes and says that:

I am over the age of 18 years and I am not a party to this action and I reside at 175 Columbus Avenue, White Plains, New York, and that on the 6th day of November, 1974, I served the annexed Motion for Leave to Proceed In Forma Pauperis on Honorable Louis J. Lefkowitz, attorney for Appellants at Two World Trade Center, New York, New York, the address designated by said attorney for that purpose, by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Susan Loss
Susan Loss

Sworn to before me, this
/ day of November, 1974.

Martin A. Schwartz
Notary Public

[illegible]
Notary Public, State of New York
No. 03-[illegible]
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1975

Supreme Court, U. S.
FILED
NOV 7 1974
[illegible]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-453

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants,

-against-

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Appellees.

ABE LAVINE, individually and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Appellants,

-against-

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

MOTION TO AFFIRM

NASSAU COUNTY LAW SERVICES COMMITTEE, INC.
285 Fulton Avenue
Hempstead, New York 11550
Tel. (516) 292-8100

THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY
By: Martin A. Schwartz, of Counsel
Lawrence S. Kahn, of Counsel
56 Grand Street
White Plains, New York 10601
Tel. (914) 761-9200

Counsel for Appellees

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-453

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants,

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ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Appellees.

ABE LAVINE, individually and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Appellants,

-against-

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Appellees.

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the three-judge District Court be affirmed on the ground that the questions presented by appellants are so unsubstantial as not to require further argument.

Question Presented.

Do New York's public assistance regulations, which cause a pro-rata reduction in the shelter allowance of a family receiving Aid to Needy Families with Dependent Children assistance solely because of the presence of a non-legally responsible person in the home, constitute a conclusive presumption of decreased shelter need in violation of the Due Process Clause, and in violation of the Social Security Act and implementing regulations as construed by this Court's decisions in King v. Smith and Lewis v. Martin?

The Operation of the Challenged Regulations.

In New York, a public assistance family's rental allowance is computed as an item of need separate from the basic standard of need for the other necessities including food and clothing. N.Y. Social Services Law, §131-a. The rental allowances are provided pursuant to 18 N.Y.C.R.R. §352.3(a)(App. G, 93a-94a).* Pursuant to this provision, each local social services district in New York has established a schedule of maximum shelter allowances based on the number of persons in the household who are eligible for public assistance. The regulation provides that "such [maximum shelter] allowance schedule shall provide a sufficient amount for all persons to obtain housing in accordance with standards of public health in the community." The rental allowance provided pursuant to section 352.3(a) thus reflects the shelter needs of the A.F.D.C. family.

The challenged regulations cause a pro-rata reduction from this shelter allowance solely because a family receiving Aid to Needy Families with Dependent Children assistance (A.F.D.C.)

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* The references are to the Appendix of Appellants' Jurisdictional Statement.

chooses to allow a person, who has no legal obligation to support the public assistance family, and who is not a recipient of public assistance, to reside with them. 18 N.Y.C.R.R. §§352.30(d); 352.31(a)(3)(IV). The regulations term this non-legally responsible person a "lodger." The facts reveal, however, that this so-called "lodger" may in fact be a disabled friend, an adult unemployed son, or an incapacitated sister. (App. A, 7a, App. B, 43a).

Under the challenged regulations, the A.F.D.C. family's shelter allowance is reduced without any determination by appellants as to whether the non-legally responsible person has made a financial contribution to the family's shelter expense, or is even able to make such a contribution, and even though the non-legally responsible person's presence in the home does not increase the rental expense to the public assistance family or to the state. In sum, the public assistance family's shelter allowance is reduced despite the fact that the public assistance family and its shelter needs remain unchanged in law and in fact.*

The reduction in the grant pursuant to the challenged regulations is substantial. In the case of the named appellees, the monthly grant was reduced by as much as $55. The single judge in the Hurley action found that "(t)his devastating reduction means in practice that rental payments must be met out of that portion of the welfare stipend alloted for food and clothing." (App. C, 64a).

That the regulations operate so as to presume that the "lodger" is paying a share of the rent is substantiated by the language of the regulations themselves: "When a female applicant or recipient is living with a man to whom she is

* See, Boucher v. Minter, 349 F.Supp. 1240, 1244 (D. Mass. 1972)(three-judge court).

not married... his available income and resources shall be applied in accordance with the following: ...." [18 N.Y.C.R.R. §352.31(a)(3)(emphasis added)] and "[in] the event [the non-legally responsible person] does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro-rata share of the regular shelter allowance." 18 N.Y.C.R.R. §352.30(d)(emphasis added).*

The Decision Below.

The majority decision of the three-judge court, in a full opinion, holds that New York's reduction in the A.F.D.C. family's shelter allowance solely because of the presence of a non-legally responsible person in the home, without determining whether the family's shelter needs in fact decreased, constitutes a conclusive presumption of rental contribution by the lodger and decreased shelter need in violation of the Due Process Clause. (App. A, 1a-20a).

In reaching this conclusion, the court below relied upon a consistent line of recent cases of this Court which hold that where important public benefits are at stake, the state may not conclusively presume relevant facts, but must determine the actual facts on a case by case basis. Board of Education v. La Fleur, 414 U.S. 632, 644 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); United States Department of Agriculture v. Murry, 413 U.S. 508 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971). The court below also held that "[t]his constitutionally required result is consistent with the statutory mandate of the federal A.F.D.C. program." [App. A, 17a and cases cited therein.]. Lewis v. Martin, 397 U.S. 552 (1970); King v. Smith, 392 U.S. 309 (1970). See also, Shea v. Vialpando, 94 S.Ct. 1746 (1974).

* As appellants state, the challenged regulations come into operation when the so-called lodger "has failed to pay his fractional share of the rent." (Jurisdictional Statement, p. 30).

The decision of the court below only requires appellants to make a case by case determination that the public assistance family's shelter needs in fact decreased prior to reducing the family's shelter allowance.* Appellants' interests are "protected... by... taking into account in determining whether a child is needy all actual and regular contributions to his support." King v. Smith, supra at 334.

I

THE DECISION BELOW IS CLEARLY CORRECT

Appellants claim that the reduction in the public assistance family's shelter allowance solely because of the "lodger's" presence in the home is justified by a change in the public assistance family's shelter needs.** (Jurisdictional Statement, pp. 9-10, 21, 31, 36-37.)

The presence of a non-legally responsible person in the home cannot itself decrease a public assistance family's shelter expense given the facts that the family's rental expense, available space and legal obligation to pay the rent are fixed. The presence of a non-legally responsible person in the home can only reduce the family's shelter needs and costs if this person pays a part of the rent, in which case the public assistance family's rental cost diminishes by the amount of the contribution.

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* This determination would be made at a state fair hearing pursuant to 18 N.Y.C.R.R. Part 358. These hearings are available in New York in compliance with this Court's decision in Goldberg v. Kelly, 397 U.S. 254 (1970).

** Appellants do not rely on the claim that the "lodger's" presence indicates that the public assistance family has excess space. This was the basis of the majority decision of the Circuit Court. (App. B, 37a). See discussion infra, at pp. 7-8.

Appellants reduce the public assistance family's shelter allowance without determining whether the non-legally responsible person has in fact made a financial contribution to the family or has paid part of the rent, or is even capable of making such a contribution or payment. By reducing the public assistance family's shelter allowance to reflect a supposed change in housing needs and costs, on the premise that the "lodger" could, should and would pay part of the rent, appellants are conclusively presuming that the lodger has the ability to make and has made such a payment, and that there has thus been a change in the public assistance family's shelter needs and costs.

As the court below held, this constitutes a conclusive presumption of decreased shelter needs and costs in violation of the Due Process Clause. This Court has consistently held that where important public benefits are at stake, the state may not conclusively presume facts but must provide the private party with a meaningful opportunity to show the actual facts. Board of Education v. La Fleur, supra; Vlandis v. Kline, supra; United States Department of Agriculture v. Murry, supra; Stanley v. Illinois, supra; Bell v. Burson, supra.*

Appellants claim that the presumption can be rebutted if the "lodger" applies for public assistance. (Jurisdictional Statement, pp. 30, 37). This does not afford public assistance families, the persons against whom the challenged regulations and conclusive presumption operate, an opportunity to rebut the presumption.** It is the party against whom the presumption operates, and who is faced with the deprivation of a "statutory

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* The three-judge court found that "(i)n the circumstances of this case, the equal protection claim overlaps analytically with the due process claim." The court therefore found it "unnecessary to articulate a seperate equal protection gound of decision." (App. A, 19a).

** The public assistance family cannot, of course, compel the so-called "lodger" to apply for assistance.

entitlement" [Goldberg v. Kelly, 397 U.S. 254, 262 (1970)], who must be afforded the opportunity to rebut the presumption. Vlandis v. Kline, supra; United States Department of Agriculture v. Murry; supra; Stanley v. Illinois, supra.

In addition, the challenged regulations violate the federal Social Security Act and its implementing regulations as construed by this Court's decisions in King v. Smith, supra and Lewis v. Martin, supra. See also, Shea v. Vialpando, supra; 45 C.F.R. §233.90(a)(1973)(App. G, pp. 89a-90a). The essence of King and Lewis is that the Social Security Act requires the states, in evaluating a family's resources to determine the amount of benefits to which a family is entitled, to consider the family's actual resources on an individualized basis. The states may not terminate or reduce the public assistance grant solely because of the presence in the home of a non-legally responsible person.

King and Lewis are designed to protect the beneficiaries of the A.F.D.C. program, the needy and dependent children. These children are not protected when the state computes the public assistance grant on the basis of presumed rather than actual facts. The New York "lodger"is the pro tanto equivalent of the substitute "parent" in King v. Smith, 392 U.S. 309 (1970) and the "man assuming the role of spouse" in Lewis v. Martin, 397 U.S. 552 (1970). New York's reduction in the public assistance grant, solely because of the presence of a non-legally responsible person in the home, leaves the needy and dependent children unprotected in clear violation of this Court's decisions in King and Lewis.

The majority decision of the Court of Appeals upholding the challenged regulations is in clear conflict with King and Lewis. (See dissenting opinion of Circuit Judge Oakes, App. B, pp. 39a-52a.) The majority decision is based primarily on the view that the "lodger's" presence shows that the public

assistance family has excess space:

> "[I]t is clear that the New York regulations are based on the fair inference from the presence of the lodger in the household that the AFDC-recipient family actually needs less space that [sic] it is paying rent for." (Ex. B, 37a).

Even appellants do not rely upon this claim to support their position. (Jurisdictional Statement, p. 23 fn.). It was completely refuted by the evidence submitted before the three-judge court on remand from the Court of Appeals. (App. A, 12a-14a). Moreover, a conclusive presumption of excess space has exactly the same effect as the presumption of available income forbidden by King and Lewis. App. B, 45a; Owens v. Parham, 350 F.Supp. 598, 604 (N.D. Ga. 1972)(three-judge court).*

This Court has consistently found it unnecessary to grant plenary review of decisions invalidating state regulations that conclusively presume the availability of income to the A.F.D.C. family because of the presence of a non-legally responsible person in the home. Hausman v. Department of Institutions and Agencies, 64 N.J. 203, 314 A.2d 362 (1974), cert. denied, 94 S.Ct. 3083 (1974); Rodriguez v. Vowell, 472 F.2d 622 (5th Cir. 1972), cert. denied, 412 U.S. 944 (1973); Reyna v. Vowell, 470 F.2d 494 (5th Cir.), aff'd, 409 U.S. 809

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* The majority opinion of the Court of Appeals also states that the challenged regulations account "for the economies of scale that are realized when individuals live in groups; ...." (App. B, 37a.) However, there is no economy of scale when the total rental obligation is fixed and the lodger does not contribute to the family's rental expense. (App. B, 50a-51a.) The majority opinion of the Court of Appeals states that the challenged regulations prevent the allocation of public assistance to non-eligible persons. (App. B, 38a.) However, the lodger is only a beneficiary of the A.F.D.C. family's generosity from its own resources. Moreover, the public assistance grant is reduced despite the fact that the rental expense to the family and the state have not increased as a result of the "lodger's" presence. (App. B, 48a.) The fact that the non-legally responsible person receives those benefits and comforts that anyone who resides with another may receive was not an acceptable basis for terminating or reducing assistance in King and Lewis.

(1972); Gaither v. Sterrett, 346 F.Supp. 1095 (N.D. Ind.) (three-judge court), aff'd, 409 U.S. 1070 (1972); X. v. McCorkle, 333 F.Supp. 1109, 1118-1119 (D.N.J. 1970), aff'd per curiam sub nom. Engleman v. Amos, 404 U.S. 23 (1971); Gilliard v. Craig, 331 F.Supp. 587 (W.D.N.C. 1971), aff'd, 409 U.S. 807 (1972); Solman v. Shapiro, 300 F.Supp. 409 (D. Conn. 1969), aff'd, 396 U.S. 25 (1969).

The decision below clearly comports with the recent decisions of this Court invalidating conclusive presumptions. The decision below comports with this Court's decisions in King v. Smith, supra and Lewis v. Martin, supra. The challenged regulations have been marked "not approved" by the United States Department of Health, Education and Welfare. [See Appellees' Exhibit "A" annexed hereto.] There is no basis for plenary review in this Court and the judgment below should be affirmed.

II

THERE IS NO CONFLICT OF DECISION.

With the exception of the majority decision of the Court of Appeals in this case,* all of the state appellate courts and all of the federal courts that have ruled on the validity of provisions which are identical or similar to the challenged regulations have held that such provisions create a conclusive presumption of financial contribution or decreased housing need in violation of the Due Process Clause or the Social Security Act. Roselli v. Affleck, 373 F.Supp. 36, 46-47 (D.R.I. 1973); Mothers and Childrens Rights Organization v. Stanton, 371 F.Supp.298 (N.D. Ind. 1973); Owens v. Parham, 350 F.Supp. 598 (N.D. Ga. 1972)(three-judge court); Boucher v. Minter, 349 F.Supp.

* "The majority decision of the Court of Appeals "stands nakedly - and thankfully - alone...." (App. B, 39a.)

1240 (D. Mass. 1972)(three-judge court); Jenkins v. Georges, 312 F.Supp. 289 (W.D. Pa. 1969)(three-judge court); Hausman v. Department of Institutions and Agencies, 64 N.J. 203, 314 A.2d 362 (1974), cert. denied, 94 S.Ct. 3083 (1974); Waits v. Swoap, 115 Cal. Rptr. 21, 24-25, 524 P.2d 117, 120-121 (1974) (alternative holding); Cooper v. Swoap, 115 Cal.Rptr. 1, 9-11, 524 P.2d 97, 105-107 (1974)(alternative holding); Matter of Battle v. Lavine, 44 App.Div.2d 307, 354 N.Y.Supp.2d 680 (2d Dept. 1974). These decisions all comport with the rationale of the court below, i.e. (a) that the public assistance grant in general, and the rental allowance in particular, cannot be reduced solely because of the presence of a non-legally responsible person in the home, and (b) that the public assistance family's shelter allowance can be reduced only if its shelter needs have in fact decreased.

Appellants do not cite any contrary decisions. Their reliance upon Gilliard v. Craig, supra, Boucher v. Minter, supra and Dullea v. Ott, 316 F.Supp. 1273 (D. Mass. 1970) is misplaced. (Jurisdictional Statement, p. 32). The issue in this case was not before the court in Gilliard. Indeed, the only issue decided by the court in Gilliard was decided in favor of the recipient. In Boucher, the court held that the termination of the public assistance family's shelter allowance because of the presence of a stepfather in the home violates the Due Process Clause and the Social Security Act. This decision thus supports appellees' position herein. The court's reference to a reclassification into "Group II" is dicta and was conceded to be correct by plaintiff's counsel. Boucher v. Minter, supra at 1245 fn. 5. Moreover, "Group II" refers to a situation where the public assistance family "shares the cost of rent" with a non-recipient. Boucher v. Minter, supra at

1241-1242. The cost of rent can only be shared if the non-recipient pays part of the rental expense. See also, Id. at 1245 fn. 5.

The only claims presented in Dullea v. Ott, supra were the right to a hearing prior to a reduction of public assistance benefits and a pendent state law claim. Dullea v. Ott, supra at 1275. That part of the Dullea decision upholding the validity of the challenged regulation is clearly dicta, was "never specifically argued by the plaintiff" and, in any case, was based on principles of substantive due process. Id., at 1276-1277. It did not deal with the issues herein, i.e., the procedural due process and Social Security Act claims. As the court below concluded, "the rule against irrebuttable presumptions is an aspect of procedural, not substantive, due process." (App. A, 16a.). Vlandis v. Kline, 412 U.S. 441, 455 (1973)(Justice Marshall, concurring); Bell v. Burson, 402 U.S. 535 (1971).

In sum, there are no state appellate court or federal court decisions which conflict with the decision of the three-judge court below.

III

THE EVIDENTIARY AND PROCEDURAL QUESTIONS RAISED BY APPELLANTS DO NOT WARRANT PLENARY REVIEW.

A. The Admissibility of the Alleged Gifts Made to Appellee Hurley.

There are four bases to support the district court's refusal to admit evidence of alleged gifts made to appellee Hurley by the "lodger".

(1) The issue of alleged contribution by appellee Hurley's "lodger"had been finally resolved in prior proceedings between the parties. Appellant Van Lare, the Acting State Commissioner,

found after a state fair hearing that the "lodger" made "no contribution" toward the support of the Hurley family. (App. C, 63a-64a). In addition, in their statement pursuant to Rule 9-G of the Civil Rules for the Southern and Eastern Districts of New York, appellants admitted appellee Hurley's sworn statement that the lodger made no contribution to the Hurley family.

(2) The alleged gifts were allegedly made prior to the time that the lodger was residing with appellee Hurley. (Jurisdictional Statement, p. 40). A gift made prior to the time a "lodger" resides with the recipient family is irrelevant to a determination of the validity of a subsequent reduction in the shelter allowance while the lodger resides with the recipient family.

(3) Whether any person, including a "lodger", makes a gift of property to a recipient is an irrelevant issue under the challenged regulations. Moreover, the financial ability of the lodger to pay part of the rental expense is irrelevant under the challenged regulations. As the single judge in the Hurley action found:

> "[T]he regulations here under scrutiny are in one sense far cruder than were those at issue in Lewis v. Martin, supra. The California statutes at least took into account the income of the stepfather or MARS in computing the stipend payable to the family. The New York regulations reduce the rental stipend regardless of the lodger's income." (App. C, 65a)(emphasis in original).

In addition, there is no federal or state provision which prohibits a third person from making a gift to a recipient of public assistance.

(4) Disclosure of the recipient's case record without the authorization of a local (as opposed to a state) social services official would violate the recipient's right of confidentiality guaranteed by New York Social Services Law, §136(2).

The three-judge court had ample bases to reject appellants' offer of proof. This decision does not present an issue worthy of plenary review.

B. The Justiciability of Appellees Taylor and Otey's Claims.

The three-judge court found it unnecessary to decide whether the claims of appellees Taylor and Otey became moot because the non-legally responsible person in their homes had either moved out or had applied for and had been declared eligible to receive public assistance.

Under the circumstances of this case, it was not necessary for the court below to make this determination. The Taylor and Hurley actions had been consolidated before both the Court of Appeals and the three-judge court. (App. A, 3a). Since appellee Hurley's claim has at all times remained justiciable, and because appellees represent a class of some 10,000 recipients of public assistance [App. A, 2a], it was unnecessary to determine whether the claims of the other named parties, Taylor and Otey, remained justiciable. One named party with a justiciable claim is sufficient to represent a class of persons. 7 Wright and Miller, Federal Practice and Procedure, §1761, pp. 586-587 (1972).*

In addition, the very nature of the controversy is such that the situations of the parties are subject to constant change. Appellee Otey's son, for example, moved in and out of her apartment several times (App. B, 33a). The issue is of a recurring nature and to hold any named party's claim moot would render that claim "capable of repitition yet evading review." Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515 (1910); Roe v. Wade, 410 U.S. 113, 125 (1973). In addition, because the challenged regulations work a reduction in the public assistance grant solely because the non-legally responsible person resides in

* Appellants did not contest the propriety of the class action before the three-judge court. (App. E, 81a).

the home, they have a continuing impact on the relationship between the public assistance family and the non-legally responsible person. See, Super Tire Engineering Co. v. McCorkle, 94 S.Ct. 1694, 1699 (1974).

C. The Scope of the Class.

The court below properly defined the scope of the class. The class consists of recipients of public assistance who receive a reduced grant of public assistance "solely because of the presence of a 'lodger' in the home pursuant to 18 N.Y.C.R.R. §§352.31(a)(3)(IV) and 352.30(d);" (App. E, 82a) (emphasis added). The use of the word "solely" in defining the scope of the class, and the decision below, make it clear that the judgment of the three-judge court does not prevent appellants from reducing the public assistance grant to the extent of actual contributions made by the non-legally responsible person. (App. A, 15a-16a). As the court below stated:

> "Before reducing the shelter allowance of a recipient family because the family houses a non-contributing lodger, the state must make an individualized determination of whether the presence of the lodger does in fact diminish the family's shelter needs." (App. A, 16a)(emphasis added).

CONCLUSION

Wherefore, appellees respectfully submit that the questions upon which this cause depends are so unsubstantial as not to need further argument, and appellees respectfully move to affirm the judgment and decree of the three-judge District Court.

Dated: November 6, 1974
White Plains, New York

Respectfully submitted,

THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY
By: Martin A. Schwartz, of Counsel
Lawrence S. Kahn, of Counsel
56 Grand Street
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NASSAU COUNTY LAW SERVICES
COMMITTEE, INC.
285 Fulton Avenue
Hempstead, New York 11550
Tel. (516) 292-8100

Counsel for Appellees

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

ASSISTANCE PAYMENTS
ADMINISTRATION

September 10, 1974

Mr. Marvin A. Schwartz
Legal Aid Society of Westchester County
56 Grand Street
White Plains, New York 10601

Dear Mr. Schwartz:

This letter confirms the information which we gave you by telephone on Friday, September 6, 1974. The call was in reply to your letter of August 20, in which you had asked for further information about New York Regulation 18 NYCRR § 352.30 (d).

The response to your first question is as follows: This section was on the page with other sections of the Regulations which were submitted to the Region II Office of the Social & Rehabilitation Service on September 1972 on Submittal No. 72-35. When the material was sent on to the central office to be filed as part of the State's approved plan for AFDC, this section 352.30 (d) was marked as not approved by the Regional Officer.

The response to the second question is that authority for approval of State Plan amendments has been delegated to the Regional Commissioner for the States within his Region; similarly the decision that a provision is "not approvable" is made by the Regional Commissioner, who usually begins negotiations with the State so it may amend or withdraw the questioned provision.

We would suggest, therefore, that you consult the Regional Commissioner for Region II, Mr. Elmer W. Smith, or the Associate Regional Commissioner for Assistance Payments, Miss Florence Aitchison, for information about why this particular section of the Regulations was considered not approvable two years ago and what its present status is. The address of the Region II office is Federal Building, 26 Federal Plaza, New York, N. Y. 10007. We are sending to Miss Aitchison a copy of the previous correspondence and of this letter so that she may be apprised of your questions.

Sincerely yours,

Catherine W. Miller
State Plan & Program Characteristics
Branch, AFA

APPELLEES' EXHIBIT "A"

NOV 14 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-453

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants,

-against-

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Appellees.

ABE LAVINE, individually and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Appellants,

-against-

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

SUPPLEMENT TO MOTION TO AFFIRM

NASSAU COUNTY LAW SERVICES COMMITTEE, INC.
285 Fulton Avenue
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Tel. (516) 292-8100

THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY
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Tel. (914) 761-9200

Counsel for Appellees

IN THE

SUPREME COURT OF THE UNITED STATES

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No. 74-453

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants,

-against-

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Appellees.

ABE LAVINE, individually and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Appellants,

-against-

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Appellees.

Appellees respectfully supplement the motion to affirm, dated November 6, 1974, in the above entitled appeals.

Appellants rely upon the dicta in Dullea v. Ott, 316 F.Supp. 1273 (D. Mass. 1970) and Boucher v. Minter, 349 F.Supp. 1240 (D. Mass. 1972), concerning the validity of a reclassification into "Group II" of the Massachusetts Public Assistance Policy

Manual. (Jurisdictional Statement, p.32). Appellees have shown that appellants' reliance upon the dicta in Dullea and Boucher is misplaced. (Motion to Affirm, pp. 10-11). In addition, appellants respectfully call the Court's attention to the fact that pursuant to a consent decree entered in the United States District Court for the District of Massachusetts on July 9, 1974, the Department of Public Welfare of the Commonwealth of Massachusetts has been permanently enjoined from enforcing this "Group II" classification by reducing the shelter allowance solely because of the presence of a non-recipient in the public assistance household. Bower v. Goldmark, D. Mass. No. 74-82-M, Final Decree entered July 9, 1974. A copy of this consent decree is annexed hereto. This consent decree clearly supercedes the dicta in Dullea and Boucher, and makes it clear that the "Group II" classification no longer exists in Massachusetts.

Dated: November 13, 1974
White Plains, New York

Respectfully submitted,

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Counsel for Appellees

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

EARL T. BOWER, CHARLOTTE BRUNNER, on behalf of themselves, their minor children and all others similarly situated,

Plaintiffs

vs.

PETER GOLDMARK, Secretary of the Executive Office of Human Services of the Commonwealth of Massachusetts, and STEVEN A. MINTER, Commissioner of the Massachusetts Department of Public Welfare, individually and in their official capacities, and THE DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF MASSACHUSETTS

Defendants

CIVIL ACTION
NO. 74-82-M

FINAL DECREE

The parties to the above-entitled action agree to the entry of the following decree:

1. The regulations of the Massachusetts Public Assistance Policy Manual (MPAPM) appearing at Chapter IV, 8A, Part 1, pages 12 and 13, which establish the Group II plan for AFDC families who reside with non-recipients of public assistance are inconsistent with the regulations implementing the Social Security Act, specifically 45 C.F.R. §2 3.90 (a), as they conclusively presume the availability of income from non-legally liable persons.

BEST COPY AVAILABLE

2. The defendant Peter Goldmark, as Secretary of the Executive Office of Human Services of the Commonwealth of Massachusetts, and the defendant Steven A. Minter, as Commissioner of the Massachusetts Department of Public Welfare, and their agents, employees, attorneys, and successors in office (hereinafter the Defendants), are permanently enjoined:

A) from enforcing or giving any effect to the aforesaid Group II plan, MPAPM Chapter IV, §A, Part 1, pages 12 and 13, for AFDC families who reside with non-recipients of public assistance;

B) from failing on or before July 1, 1974, to promulgate the following regulations which will:

1) add a new page 12 of Chapter IV, Section A, Part 1, which will (a) provide a new definition for Group I - Full Common Household Expenses, as follows:

"Group I - Full Common Household Expenses

This group includes any situation where: (1) The AFDC family or pregnant woman is responsible for the full cost of household expenses and does not reside with another family or individual. In this arrangement client is entitled to a full rental exception based on actual rent; or (2) The recipient is responsible for paying the full shelter costs, but lives with a non-recipient(s). All payments from the non-recipient(s) towards the recipient's household expenses are to be considered as income, unless the individual(s) residing in the home is a roomer or boarder, in which case income will be considered in accordance with Chapter IV, Section 13, page 2, item 5.

In this situation client is entitled to full rental exception based on actual rent; or (3) The AFDC family or pregnant woman shares the cost of household expenses with a non-recipient. A rental exception may be provided in this situation if the actual amount of rent paid by the recipient warrants such an exception."

and (b) will change the definition of Group II so that it will read in its entirety:

"Group II - Shared Common Household Expenses

This group includes any type of living arrangement where the AFDC family shares the cost of rent or carrying charges, fuel and utilities with (1) another AFDC family or (2) a GR family with children."; and

2) delete from page 13 of Chapter IV, §A, Part 1, the first sentence of the second paragraph under "OTHER LIVING ARRANGEMENTS", which reads:

"(In situations involving non-recipients, they are responsible for their proportionate share of common household expenses.)"

C) from failing on or before July 15, 1974, to distribute the following State Letter:

(heading)

State Letter_____
(date)

TO: WELFARE SERVICE OFFICES

FROM: STEVEN A. MINTER, COMMISSIONER

RE: PLACEMENT OF AFDC FAMILIES RESIDING WITH NON-RECIPIENTS IN GROUP I

BEST COPY AVAILABLE

This letter transmits material which changes the Department's policy in the budgeting of AFDC families who reside with non-recipients of public assistance, which is the result of a consent decree filed in Federal Court.

AFDC families who reside with non-recipients and share the cost of household expenses are to be budgeted in Group I. In this situation any payment made for shelter by the non-recipient is not to be considered as income to the recipient. Rental exceptions are to be based on the actual rent for which the AFDC family is responsible. In addition, AFDC families who are responsible for paying all the shelter costs but who have non-recipients living with them are to be budgeted in Group I. In the latter situation any payment towards the recipient's household expenses made by the non-recipient(s) is to be considered income to the recipient and deducted from the budget as income unless the non-recipient is a boarder and the income is to be considered in accordance with the policy in Chapter IV, Section B, Page 2, item 5.

Budgets are to be adjusted pursuant to this State Letter retroactive to July 1, 1974.

PEN AND INK REVISIONS

PA Policy Manual, Chapter IV, Section A, Part 1, page 13 - Delete the entire second paragraph under OTHER LIVING ARRANGEMENTS.

NEW AND REVISED MATERIAL

PA Policy Manual, Chapter IV

Section A, Part 1, Page 12 - transmitted by S.L. #74"; and

D) from failing to mail, on or before July 15, 1974,

a notice from Central Data Processing as follows:

"TO AFDC RECIPIENTS WHO LIVE WITH OTHERS

Our records indicate that you are in a living arrangement with another individual or family. If you are living with an individual or a family who are not receiving AFDC, General Relief or Supplemental Security Income, you

should answer the following questions and bring them to the WSO so that the amount of your assistance can be changed (in most cases it will result in an increase in your grant):

Answer these questions only if you live with someone who is not a recipient.

1. What is the total cost of shelter for your home?

   a. Rent
   b. Mortgage _____
   c. Heat _____
   d. Utilities _____

2. What is the actual cost that you pay towards these items?

   a. Rent
   b. Mortgage _____
   c. Heat _____
   d. Utilities _____

When you come to the Welfare Office, please bring any statements, bills, or receipts which reflect the above costs. All adjustments will be retroactive to July 1, 1974.

This change is a result of a consent decree entered in Federal District Court in Boston in the case of Bower v. Goldmark, 74-82-M. If you have any problems, contact Central Massachusetts Legal Services in Fitchburg, or the Harvard Legal Aid Bureau in Cambridge."; and

E) from failing to have adjusted all budgets of AFDC families who reside with non-recipient(s) according to the above regulations by September 1, 1974.

Steven A. Minter
STEVEN A. MINTER, Defendant
Commissioner of Public Welfare

[illegible]
Attorney for Defendants

BEST COPY AVAILABLE

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ATTORNEYS FOR PLAINTIFFS

By order of the Court.

FRANK J. MURRAY
District Judge for the
District of Massachusetts

Entered:
July 9, 1974

Supreme Court, U. S.
FILED
FEB 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-453

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants,

against

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

No. 74-5054

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR, CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Petitioners,

against

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, JAMES M. SHUART, individually and in his capacity as Commissioner of the Nassau County Department of Social Services, BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, and LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLANTS IN NO. 74-453 AND FOR RESPONDENTS IN NO. 74-5054

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TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Opinions Below	3
Jurisdiction	3
Regulations Involved	4
Questions Presented	5
Statement of the Case	6
A. Shelter Allowances Under New York Public Assistance Programs	6
B. The Facts	11
C. Proceedings Prior to Remand	20
D. Proceedings on Remand	24
Summary of Argument	30
POINT I—The payment of public assistance shelter allowances to recipients in proportion to their actual number in dwellings shared with non-recipient, non-paying lodgers does not offend any provision of the Social Security Act or federal implementing regulations providing for aid to families with dependent children	35
POINT II—The Payment of shelter allowances to recipients in proportion to their actual number in dwellings shared with non-paying lodgers does not offend the recipients' rights to equal protection of the laws	44

PAGE

A. The appropriate equal protection standard is one of reasonable relation to a legitimate state interest 44

B. The non-paying lodger provision of § 352.30 (d) bears a reasonable relation to legitimate state interests in the distribution of limited public assistance funds 45

C. The "contributing" lodger provision of § 352.30(d) bears a reasonable relation to the state interest in reducing grants and allowances by recipient's income and in encouraging recipients to take in paying lodgers 50

POINT III—The payment of shelter allowances to recipients in proportion to their number in dwellings shared with non-paying lodgers compensates recipients for their actual shelter needs and does not rest on any irrebuttable presumption in violation of the recipients' rights to due process of law 52

POINT IV—The District Court erred in refusing to allow evidence of substantial contributions of household furnishings made to appellee Hurley by her lodger prior to the events giving rise to the action and in striking conforming allegations and documentation from appellants' answer 62

POINT V—The District Court erred in refusing to dismiss the claims of appellees Taylor and Otey as moot notwithstanding that neither appellee continued to have a live grievance against the operation of § 352.30(d) 66

PAGE

POINT VI—The District Court erred in defining the appellee class to include recipients who share shelter with contributing lodgers and with non-paying lodgers and in invalidating both provisions of § 352.30(d) when those provisions are severable and no named appellee shared shelter with a contributing lodger 69

Conclusion 72

Exhibit "1" 1a

Exhibit "2" 5a

TABLE OF CASES

Augustus v. *Board of Public Instruction of Escambria County, Florida*, 306 F.2d 862 (5th Cir. 1962) 65

Bailey v. *Patterson*, 369 U.S. 31 (1962) 67, 70

Baird v. *Davoren*, 346 F.Supp. 515 (D. Mass. 1972) 69

Baker v. *Carr*, 369 U.S. 186 (1962) 68

Battle v. *Lavine*, 44 A.D. 2d 307 (2d Dept. 1974) 10

Bell v. *Burson*, 402 U.S. 535 (1971) 52, 59

Boucher v. *Minter*, 349 F.Supp. 1240 (D. Mass. 1972) 8, 37, 38

Budget Dress Corp. v. *International Ladies Garment Workers' Union, AFL-CIO*, 25 F.R.D. 506 (S.D. N.Y. 1959) 65

Carleson v. *Remillard*, 406 U.S. 598 (1972) 38, 42

Carrington v. *Rash*, 308 U.S. 89 (1965) 59

PAGE

Charleston v. *Wohlgemuth*, 332 F.Supp. 1175 (E.D. Pa., 1971), *aff'd* 405 U.S. 970 (1972) 41

Cleveland Board of Education v. *La Fleur*, 414 U.S. 632 (1974) 59, 60

Connell v. *Higgenbottom*, 403 U.S. 207 (1971) 69

Dandridge v. *Williams*, 397 U.S. 471 (1970) 41, 44, 45, 47, 48, 49, 58, 61

DeFunis v. *Odegaard*, 416 U.S. 312 (1974) 66, 67

Dorchy v. *Kansas*, 264 U.S. 286 (1924) 69

Dullea v. *Ott*, 316 F.Supp. 1273 (D. Mass. 1970) 38

Edelman v. *Jordan*, 415 U.S. 651 (1974) 67

Ferguson v. *Skrupa*, 372 U.S. 763 (1963) 47, 61

Gaither v. *Sterret*, 346 F.Supp. 1095 (N.D. Ind.), *aff'd* 409 U.S. 1070 (1972) 41

Gatewood v. *North Carolina*, 238 U.S. 347 (1906) .. 69

Geduldig v. *Aiello*, 417 U.S. 484 (1974) 44, 45, 50

Gilliard v. *Craig*, 331 F.Supp. 587 (W.D.N.C.), *aff'd* 409 U.S. 807 (1972) 37

Goldberg v. *Kelly*, 397 U.S. 254 (1970) 56

Golden v. *Zwickler*, 394 U.S. 103 (1969) 68

Guinn v. *United States*, 238 U.S. 347 (1915) 69

Harrison v. *NAACP*, 360 U.S. 167 (1959) 69

Heiner v. *Donnan*, 285 U.S. 312 (1932) 52, 59

Indiana Employment Security Div. v. *Barney*, 409 U.S. 540 (1973) 67, 70

Irving Berlin, Inc. v. *Anziano*, 4 F.R.D. 33 (S.D.N.Y. 1944) 65

Jefferson v. *Hackney*, 406 U.S. 535 (1972) ..36, 41, 43, 44, 45 47, 50, 51, 58

PAGE

Khan v. *Shevin*, 416 U.S. 351 (1974) 48, 51

King v. *Georgia Power Co.*, 295 F. Supp. 943 (N.D. Ga. 1968) 65

King v. *Smith*, 392 U.S. 309 (1968) 23, 32, 41, 42, 44, 48, 51, 71

Kinnear-Weed Corp. v. *Humble Oil Refining Co.*, 214 F. 2d 891 (5th Cir. 1954) 65

Lewis v. *Martin*, 397 U.S. 352 (1970) 23, 41, 42, 48

Lindsley v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911) 44

Lopez v. *Vowell*, 471 F. 2d 690 (1973), *aff'd* 411 U.S. 933 (1973) 37

Massachusetts v. *Mellon*, 262 U.S. 447 (1923) 68

McGowan v. *Maryland*, 366 U.S. 420 (1961) 44

Mil-Hall Textile Co. v. *Dun & Bradstreet, Inc.*, 160 F. Supp. 778 (S.D.N.Y. 1958) 65

New York State Department of Social Services v. *Dublino*, 413 U.S. 405 (1973) 36, 42, 43, 45

O'Shea v. *Littleton*, 414 U.S. 488 (1974) 67, 68, 70

Richardson v. *Belcher*, 404 U.S. 78 (1974) 44, 45, 47, 51, 56

Richardson v. *Ramirez*, 418 U.S. 24 (1974) 66

Rodriguez v. *Vowell*, 472 F. 2d 622 (5th Cir. 1973), *cert. den.* 412 U.S. 944 (1973) 37

Rosado v. *Wyman*, 397 U.S. 397 (1970) 21

Rosen v. *Hursh*, 464 F. 2d 731 (8th Cir. 1972) 41

Rothstein v. *Wyman*, 467 F. 2d 226 (2d Cir. 1972), *cert. den.* 411 U.S. 921 (1973) 67

PAGE

Schlesinger v. *Wisconsin*, 270 U.S. 230 (1926) 52, 60

Schneider Granite Co. v. *Gast Realty Co.*, 245 U.S. 288 (1917) 69

Shea v. *Vialpando*, 416 U.S. 251 (1974) 51

Snell v. *Wyman*, 281 F. Supp. 853 (S.D.N.Y. 1968), *aff'd* 393 U.S. 323 (1969) 41

Solman v. *Shapiro*, 300 F. Supp. 403 (D. Conn.) *aff'd* 396 U.S. 5 (1969) 41

Sosna v. *Iowa*, —— U.S. ——, 43 U.S.L.W. 4125 (January 14, 1975) 67

South Side Drive-In Co. v. *Warner Bros.*, 30 F.R.D. 32 (Ed. Pa. 1962) 65

Stanley v. *Illinois*, 405 U.S. 645 (1972) 59

Tennessee Electric Power Co. v. *Tennessee Valley Authority*, 306 U.S. 118 (1939) 65

Thompson v. *United Artists Theatre Circuit, Inc.*, 43 F.R.D. 197 (S.D.N.Y. 1967) 65

Townsend v. *Swank*, 404 U.S. 282 (1971) 39, 42

United States v. *Jackson*, 390 U.S. 570 (1968) 69

United States Department of Agriculture v. *Moreno*, 413 U.S. 528 (1973) 44, 50

United States Department of Agriculture v. *Murry*, 413 U.S. 508 (1973) 59, 60

Vlandis v. *Kline*, 412 U.S. 441 (1973) 59, 60

Williams v. *Wohlgemuth*, 366 F.Supp. 541 (W.D. Pa. 1973), *aff'd.* 416 U.S. 901 (1974) 37

Williamson v. *Lee Optical Co.*, 348 U.S. 483 (1955) ...44, 47

Wyman v. *James*, 400 U.S. 309 (1971) 42

PAGE

X v. *McCorkle*, 333 F.Supp. 1109 (D.N.J. 1970), *aff'd. per curiam sub nom. Engelman* v. *Amos*, 404 U.S. 23 (1971) 39, 41

Statutes and Regulations

PAGE

Federal Statutes

28 U.S.C. § 1253 3

28 U.S.C. § 1254 3

42 U.S.C. § 601 .....5, 20, 35

§ 602 .....5, 15, 21, 23, 36, 37, 39, 42, 51, 69, 71

§ 606 .....19, 36, 37, 39

§ 607 36

§ 1983 4

State Statutes

New York Social Services Law § 131 .....5, 36, 37

§ 131-a 5, 6, 7, 37, 38, 71

§ 132 .....11, 40

§ 134 11

§ 134-a 11, 40

§ 135-a 10, 55

§ 135-b 10, 55

§ 143-b 37

§ 145 ..... 5, 49

§ 158 36

§ 169 36

§ 343 5

§ 344 5

§ 349 .....5, 36, 51

§ 350 ..... 5, 36

Federal Regulations

45 C.F.R. § 233.20 ..... 5, 42

§ 233.90 .....5, 20, 21, 22, 42, 51

PAGE

State Regulations
18 N.Y.C.R.R. Part 351 11
§ 352.1 ..... 6, 7
§ 352.2 ..... 6, 7
§ 352.3 .....5, 6, 7, 10, 11, 38, 55
§ 352.4 6
§ 352.5 7
§ 352.6 ..... 6, 7
§ 352.7 ..... 5, 36
§ 352.8 ..... 6, 7
§ 352.11 .....11, 40
§ 352.12 .....11, 40
§ 352.15 .....11, 40
§ 352.23 .....11, 40
§ 352.25 .....11, 40
§ 352.27 .....11, 40
§ 352.28 11
§ 352.30 .....*passim*
§ 352.31 .....2, 4, 5, 8, 20
Part 358 .....10, 55

MISCELLANEOUS

Federal Rules of Civil Procedure
Rule 12 65
Rule 23 70
Rule 61 62

Federal Rules of Evidence
Rule 103 62
Rule 401 64

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-453

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants,

against

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Appellees.

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ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR, CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Petitioners,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLANTS IN NO. 74-453 AND FOR RESPONDENTS IN NO. 74-5054

Preliminary Statement

In *Van Lare* v. *Hurley,* No. 74-453, the Commissioner and former Acting Commissioner of the New York State Department of Social Services appeal from a judgment and

order of a three-judge district court for the Southern and Eastern Districts of New York (HAYS, C.J. dissenting) finding 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv) unconstitutional under the Due Process Clause and permanently enjoining their enforcement (A. 661-663).* The judgment and order was entered on August 15, 1974 following the remand of *Taylor* v. *Lavine,* 497 F. 2d 1208, from the United States Court of Appeals for the Second Circuit to the district courts.

In *Taylor* v. *Lavine,* No. 74-5054, certiorari was granted to review the decision of the United States Court of Appeals for the Second Circuit (OAKES, C.J. dissenting), dated May 14, 1974, finding 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv) consistent with certain federal statutes and regulations governing Aid to Families with Dependent Children and remanding the constitutional claims alleged against the state regulations to a three-judge district court (A. 170).

The *Hurley* and *Taylor* actions were commenced respectively in the Southern and Eastern Districts of New York. Both actions raised substantially identical statutory and constitutional claims and were therefore consolidated on appeal to Second Circuit, *sub nom. Taylor* v. *Lavine* (statutory claims), and on remand to the three-judge court, *sub nom. Hurley* v. *Van Lare* (constitutional claims). By order dated January 13, 1975, this Court consolidated its review of the Second Circuit decision (No. 74-5054) with the appeal from the three-judge district court (No. 74-453) and permitted the filing of one appendix and briefing as one action. The state appellants in No. 74-453, respondents in No. 74-5054, undertook the filing of the opening brief and are hereinafter referred to as "appellants." The appellees in No. 74-453, petitioners in No. 74-5054, are hereinafter referred to as "appellees."

---

* References preceded by the letter "A" refer to the Appendix filed in this Court.

Opinions Below

The majority and dissenting opinions of the three-judge district court in *Hurley* v. *Van Lare,* dated August 5, 1974 (A. 639-660), are reported at 380 F. Supp. 167.

The majority and dissenting opinions of the United States Court of Appeals for the Second Circuit in *Taylor* v. *Lavine,* dated May 14, 1974 (A. 157-184), are reported at 497 F. 2d 1208.

The opinion of the United States District Court for the Southern District of New York in *Hurley* v. *Van Lare,* dated October 3, 1973 (A. 74-94), is reported at 365 F. Supp. 186.

The memorandum and order of the United States District Court for the Eastern District of New York in *Taylor* v. *Lavine,* dated October 10, 1973 (A. 140-143), is unreported.

Jurisdiction

The jurisdiction of this Court to hear the appeal in *Van Lare* v. *Hurley,* No. 74-453, is conferred by 28 U.S.C. § 1253.

The judgment and order appealed from was entered in the district court on August 15, 1974 (A. 661-663). The Jurisdictional Statement was filed on October 18, 1974. Probable jurisdiction was noted on December 9, 1974.

The jurisdiction of this Court to review the Second Circuit decision in *Taylor* v. *Lavine,* No. 74-5054, is conferred by 28 U.S.C. § 1254(1).

The Second Circuit decision is dated May 14, 1974. A petition for rehearing containing the suggestion that the appeal reheard *en banc* was denied on June 18, 1974 (A. 185-186). The Petition for a Writ of Certiorari was filed on August 2, 1974. Certiorari was granted on December 9, 1974.

The jurisdiction of the district courts was conferred by 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) and (4).

Regulations Involved

18 N.Y.C.R.R. § 352.30 states in part:

352.30 Persons included in the budget

* * *

(d) A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15 shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular allowance.

18 N.Y.C.R.R. § 352.31 formerly stated in part:

352.31 Estimate of need and application of income

(a) For applicant or recipient.

* * *

(3) When a female applicant or recipient is living with a man to whom she is not married, other than on an occasional or transient basis, his available income and resources shall be applied in accordance with the following:

* * *

(iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(d)." [*]

Sections 352.30 and 352.31(a)(1)-(3) are set forth in full in Exhibit "1" to this brief. The following related federal statutes and regulations and state statutes and regulations are set forth in Exhibit "2": federal statutes—42 U.S.C. §§ 601, 602(a)(7), (10), 606(a), (b), (c); federal regulations—45 C.F.R. § 233.20(a)(1), 233.90(a); state statutes—Social Services Law §§ 131(1), (3), (4), 131-a(1), (2), (3), 145(1), (2), 343, 344(1), 349(A), 350(1)(a); state regulations—18 N.Y.C.R.R. §§ 352.3(a), (c), 352.7(f).

Questions Presented

1. Whether the pro-ration of public assistance shelter allowances when recipients share shelter with non-recipient, non-paying lodgers offends the Social Security Act and implementing regulations governing Aid to Families with Dependent Children?

2. Whether the pro-ration of shelter allowances denies recipients who share shelter with non-recipient, non-paying lodgers the equal protection of the laws?

3. Whether the pro-ration of shelter allowances when recipients share shelter with non-recipient, non-paying

---

* Effective July 26, 1974, § 352.31(a)(3) was amended to state in part:

(3) When an applicant or recipient is living, other than on an occasional or transient basis, with a person to whom such applicant or recipient is not married, the available income and resources of such person shall be applied in accordance with the following:

* * *

(iv) When the person is unwilling to assume responsibility for the applicant or recipient or his or her children and there are no children for whom such person is legally responsible, such person shall be treated as a lodger in accordance with subdivision (d) of section 352.30 of this Part.

lodgers depends on an "irrebuttable presumption" in violation of the recipients' rights to due process of law?

4. Whether the district court erred in refusing to allow evidence of substantial "contributions" of household furnishings made to the Hurley appellees by their lodger prior to the events giving rise to the action and in striking conforming allegations and documentation from appellants' answer?

5. Whether the district court erred in refusing to dismiss the claims of appellees Taylor and Otey as moot notwithstanding neither appellee continued to have a live grievance against § 352.30(d)?

6. Whether the district court erred in defining the appellee class to include recipients who share shelter with contributing lodgers and with non-paying lodgers and in invalidating both provisions of § 352.30(d) when those provisions are severable and no named appellee shared shelter wtih a contributing lodger?

Statement of the Case

A. Shelter Allowances Under New York Public Assistance Programs

The public assistance programs administered by the New York State Department of Social Services and the local social services districts provide for the separate determination of the shelter needs of applicants and recipients and the payment of shelter allowances as separate components of total public assistance benefits.* Social Services Law

* At present, the state and local districts administer AFDC (ADC) and Home Relief-Veteran Assistance. The cost of the AFDC program is shared by the federal government (50%); the state (25%), and the local districts (25%). The cost of the Home Relief—Veterans Assistance program is shared by the state (50%) and the local districts (50%). The basic components of the grant issued under either program are a shelter allowance and a "pre-added" or "basic" flat grant for food, clothing and incidentals. Social Services Law § 131-a(2) (Ex. "2" pp. 10a-11a); 18 N.Y.C.R.R. §§ 352.1-352.4, 352.6, 352.8.

§ 131-a (1), (2) (Ex. "2", pp. 10a-11a); 18 N.Y.C.R.R. §§ 352.1-352.4, 352.6, 352.8.

Shelter allowances for the payment of rent are provided pursuant to 18 NYCRR § 352.3(a) (Ex. "2" p. 14a).* Under the terms of the regulation, each of the 58 local social services districts files a schedule setting forth monthly maximum allowances, by number of rooms, which are sufficient to permit public assistance recipients to obtain housing in accordance with community public health standards. The district then must pay the recipients who occupy an entire dwelling actual rent up to the appropriate maximum. 18 N.Y.C.R.R. § 352.3(a) (Ex. "2" p. 14a).**

In practice, the local districts have varied the terms of § 352.3(a) by using the number of recipients and/or the number of rooms to determine appropriate shelter allowances and have exceeded the scheduled maximums when necessary to obtain suitable housing.*** As a result of the implementation of the schedules and the granting of exceptions, over 93% of New York recipients receive shelter

* Fuel allowances are provided pursuant to Social Services Law 131-a(2) (Ex. "1" p. 11a) and 18 N.Y.C.R.R. § 352.5. They are pro-rated in the same manner as shelter allowances and are not considered further herein.

** A new § 352.3(a) setting forth a state-wide schedule of shelter allowances by social services district and public assistance family size has been published in 18 N.Y.C.R.R. Title 18. The effective date of the new schedule is projected as April 1, 1975. However, the schedule has been filed by 14 districts as their local schedules under § 352.3(a) as it is presently in force. See Defts. Ex. "B" for new schedule and list of the 14 districts which have adopted it (A. 522-525). The new schedule does not affect the principle of pro-ration as expressed in § 352.30(d).

*** For example, the Westchester County Schedule employs both public assistance group size and number of rooms to establish maximums and authorizes exceptions with supervisory approval. Dfts. Ex. "B" (A. 599-602). Assistance group size and number of rooms are used in Madison (A. 548), Nassau (A. 551), Otsego (A. 574-575) and Warren (A. 595-596). Number of rooms is used in Broome (A. 527), Lewis (A. 545-546), Oneida (A. 562), Ontario

(footnote continued on following page)

allowances equal to their shelter costs (A. 258).* Appellees did not contest the methods for establishing shelter allowance maximums, the adequacy of those maximums or appellant Commissioner's acquiescence in the local districts' granting of exceptions (A. 15-28, 107-119).

Shelter is the shared need of all persons living in the same dwelling. Thus an AFDC eligible caretaker relative and child living alone in effect receive two shelter payments, one for the caretaker relative and one for the child, reflecting the fact that the shelter need of each is a share of the dwelling in which they reside and that the entitlement of each is a pro-rated portion of the allowed rent. *Boucher* v. *Minter*, 349 F. Supp. 1240, 1244 (D. Mass. 1972). Sections 352.30(d) and 352.31(a)(3)(iv)** here in issue simply provide a method for determining and compensating the shelter needs of public assistance recipients when they choose to share their dwelling with an additional person (or persons) who is neither an applicant nor a recipient of public assistance and who is therefore not entitled to have his (or her or their) shelter need met from public funds.

(*footnote continued from preceding page*)

(A. 571), Orleans (A. 572), Schenectady (A. 586-587), Schuyler (A. 589) and Yates (A. 603). Assistance group size is used in Cayuga (A. 528), St. Laurence (A. 583) and in the 14 districts that have adopted the new state-wide schedule as their local schedule (A. 522). Only Nassau (A. 551), Onondaga (A. 563-569) and Schenectady (A. 587) have a stated policy against exceptions to the maximums. New York City has no fixed maximums (A. 552-561).

* The remaining 7% consists largely of employed recipients who benefit from certain income exemptions and therefore have extra money available for rent or recipients whose rent only slightly exceeds the allowances they receive (A. 351-352).

** Section 352.30(d) is the operative regulation in issue. Section 352.31(a)(3)(iv), both in the form considered by the courts below and as amended, merely illustrates an appropriate application of § 352.30(d). It was therefore properly regarded as superfluous by both the parties and the court below. The single exception is Judge Oakes' dissenting opinion in the Second Circuit suggesting that on remand, the three judge district court find § 352.31(a)(3)(iv) a "violation of equal protection on the basis of sex" (A. 174). Judge Weinstein writing for the district court majority, rejected the suggestion (A. 654). Any further need to consider the alleged sex discrimination issue was obviated by the recent amendment to § 352.31(a)(3)(iv) which generally substitutes the word "person" for "female" and "man". See p. 5, *ante* and Ex. "1" p. 3a.

Section 352.30(d) defines a lodger as a "non-legally responsible relative" or "unrelated person" who is neither an applicant for nor a recipient of public assistance and who shares a dwelling (or a household in the case of boarding lodgers) with one or more recipients.* He may be a contributing or a non-paying ("non-contributing") lodger.** With respect to contributing lodgers, § 352.30(d) provides that the amount paid in excess of the minimum ($15 monthly for lodgers; $60 monthly for boarding lodgers) shall be income to the public assistance group and offset against the standard of need. Social Services Law § 131-a(1) (Ex. 2, pp. 10a-11a). With respect to non-paying lodgers (those who do not make the minimum $15 payment), § 352.30(d) provides that the shelter allowance be pro-rated among the number of people living in the dwelling and an amount equal to the lodger's fractional share excluded from the allowed rent, i.e., "regular shelter allowance." Pro-rating the allowed rent in this manner enables the social services districts to determine the lodger's shelter need with regard to the number of persons with whom shelter is in fact shared; to separate his shelter need from those of the public assistance group; and to prevent payment of his share from public assistance funds for which he has not demonstrated eligibility.

The factual determinations made in support of proration are as follows: that a "non-responsible relative" or

* For convenience, the lodger is hereinafter generally referred to as a non-recipient and the masculine singular is adopted.

** Section 352.30(d) uses, both "pays" and "contribute". Appellant use the term "pays" throughout when referring to the proration provision of § 352.30(d) since it is directed exclusively to the lodger's own share of shelter cost and the term "contribute" may include a payment for the benefit of the assistance group as well as a payment on the lodger's own behalf.

"unrelated persons" is living with recipients; that he is not himself a recipient; that he has failed to pay at least $15 as his share of shelter cost; the number of recipients in the dwelling; and the allowed rent prior to the lodger's joining them. These determinations are made initially by the local social services district after investigation and may be reviewed at a state fair hearing at the request of the recipients. Social Services Law §§ 135-a, 135-b; 18 N.Y.C.R.R. Part 358.

If a non-recipient chooses to share his dwelling with recipients, New York again distinguishes the shelter need of the non-recipient from those of the recipients and pays shelter allowances to the recipients in proportion to their shares of the shelter cost. 18 N.Y.C.R.R. § 352.3(c) (Ex. "2" p. 15a).*

Since the lodger is a non-recipient, he is not entitled to have his shelter need (or any other need) considered in computing a public assistance budget or paid from public funds. Thus, in distinguishing the shelter need of the non-paying lodger from those of the recipients, § 352.30(d)

* The only difference between § 352.3(c) and § 352.30(d) is that under the former, the actual rent is pro-rated and the recipients receive their shares up to the appropriate maximum whereas under the latter, the allowed rent ("regular shelter allowance") is pro-rated. However, since the allowed rent pro-rated under § 352.30(d) largely equals the actual rent, the recipients receive their fair share of shelter cost regardless of whether § 352.3(c) or §352.30(d) is applied.

Section 352.3(c) was invalidated as inconsistent with 45 C.F.R. § 233.90(a) in *Battle* v. *Lavine*, 44 A.D. 2d 307 (2d Dept. 1974). Principal reliance was placed on Judge Bauman's decision in *Hurley* v. *Van Lare* (A. 74-94) which was subsequently reversed by the Second Circuit (A.157-184). Review of the opinion suggests that § 352.3(c) was not properly in issue. The petitioner's shelter allowance had been discontinued because of her landlord's failure to provide certification of mortgage payments. The question of whether the petitioner in fact shared shelter with the landlord (the petitioner's child's grandfather) or maintained a separate residence was apparently not resolved at the fair hearing. See opinion of CHRIST, J. concurring in part 44 A.D. 2d at 310. The *Battle* case is now on appeal to the New York Court of Appeals.

insures that public monies will be distributed to and conserved for those who meet prescribed eligibility requirements. In addition, since the non-paying lodger must either have the capacity to pay his share of shelter costs or be incapable of doing so, § 352.30(d) prevents the financially capable lodger from diverting public funds from those who are truly "needy" and requires that the allegedly "poor" lodger be examined under the same standards of eligibility and bear the same obligations of repayment as all recipients. Social Services Law §§ 132, 134, 134-a; 18 N.Y.C.R.R. Part 351; 18 N.Y.C.R.R. §§ 352.11, .12, .15, .23, .25, .27, .28.

To the extent that contributing lodger provision of § 352.30(d) exempts the first $15 ($60 for boarding lodgers) paid in any month, it reflects state policy encouraging recipients to take in contributing rather than non-paying lodgers (A. 259-260).

B. The Facts

Appellee Hurley

Appellee Hurley receives public assistance for herself and her three minor children on the AFDC categorial assistance program. Their benefits include a shelter allowance pursuant to 18 N.Y.C.R.R. § 352.3(a) (Ex. "2" pp. 14a-15a).

During the approximate period from December 8, 1969 to March 5, 1971, Mrs. Hurley and her children lived in a first floor apartment at 210 Hillside in Mount Vernon, New York, Westchester County (A. 233).* The apartment con-

* In her papers below, Mrs. Hurley describes two other residences, one at 90 Brookside Avenue in Mount Vernon (A. 19-20, 32, 231, 233) and one in Bloomingburg, New York, in Sullivan County (A. 232, 234). Mrs. Hurley also lived in an upstairs apartment at the same Hillside Avenue address (A. 222). There is no claim that any of Mrs. Hurley's changes of residence were the result of any state or local regulation or policy.

sisted of a living room, kitchen with dining area, three bedrooms and bath.* The actual rent was $150.00 per month. The maximum shelter allowance was $198.00 per month. Defts. Ex. "B" Westchester County Schedule (A. 599). With the exception of the four month period giving rise to her claims, Mrs. Hurley and her children received a shelter allowance of $150.00 a month, or the equivalent of the rent (A. 217, 233).**

From November of 1970 through February of 1971, ADR, a male friend, resided with the Hurleys. Although it is not disputed that ADR was employed during this time, he did not pay any portion of the rent and did not make any contributions to the Hurleys (A. 20-21, 33, 36-37). However, between April of 1969 and September 14, 1970, appellants' alleged before the three-judge court that ADR gave the Hurleys substantial "contributions" of household furnishings including wall-to-wall carpeting, a color television, a bedroom suite, and a dinette set.***

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* Mrs. Hurley's upstairs apartment at Hillside Avenue consisted of five rooms and is the one she apparently describes in her affidavit of July 5, 1974 (A. 233-234). However, during the time she had a non-paying lodger, she lived in the 6 room first floor apartment at that address. See case worker's report A. 222-224. The report was subject to a motion to strike determined adversely to appellants (A. 632-633). That ruling is raised on this appeal. The motion to strike was not predicated on any dispute about the size of the Hurley apartment during the "lodger" period.

** According to a survey conducted by N.Y.D.S.S. in 1971, the mean shelter cost for a public assistance group of four in Westchester County was $148 per month (Defts. Ex. "D", Table 3, A. 619), two dollars less than the Hurleys were in fact paying and substantially less than the Westchester maximums of $182 (3-4 persons, 4 rooms) and $198 (3-4 persons, 5 room) (A. 599).

*** Appellants listed the contributions at paragraph "14" of their Answer in *Hurley* v. *Van Lare* (A. 218) and annexed the caseworker's report of her discovery of the contributions during a "home visit" on September 15, 1970 (A. 222-224). Appellants were also prepared to offer the testimony of the caseworker at the evidentiary hearing in June 26, 1974 (A. 356-359). On appellees' motion, paragraph "14" of the Answer and the report were stricken (A. 632-633). The offer of the caseworker's testimony was also refused (A. 359). Both rulings are raised herein.

Upon verifying that ADR was residing with the Hurleys, that he was neither an applicant for nor a receipient of public assistance and that he had not paid any portion of the rent, the Westchester social services agency advised appellee that the public assistance grant paid to her family would be reduced by $35 per month for the period of ADR's residence (A. 33). The local agency's determination was modified at a state fair hearing to reduce only the shelter allowance by $30 monthly (1/5 x $150.00) for the period of ADR's residence is conformity with § 352.30 (d) (A. 36-37).

The Hurleys presently live in Sullivan County where they continue on the AFDC program. Although they no longer have a lodger residing with them, Mrs. Hurley advised the district court that she wished to have a certain non-paying male friend (not ADR) live with her and would do so but for the pro-ration provision of § 352.30(d) (A. 232, 234). Appellants accept her allegations in this regard as true.

Appellee Taylor

Appellee Taylor receives public assistance for herself and her minor child on the AFDC program. Their benefits include a shelter allowance.

Appellee and her child share an apartment with appellee's sister, Virginia Taylor, in Freeport, New York, in Nassau County. The apartment consists of a living room, kitchen, bedroom and bath (A. 225-226). The actual rent for the apartment (through May 31, 1974) was $180 per month (A. 111). The maximum shelter allowance in Nassau County for an apartment of 3-4 rooms accommodating a public assistance group of three is $165. Dfts. Ex. "B", Nassau County Schedule (A. 551).*

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* The 1971 N.Y.D.S.S. study shows the mean shelter cost for a public assistance group of three persons in Nassau County as $178 per month. Dfts. Ex. "D" Table 3 (A. 619). Appellee Taylor

(footnote continued on following page)

Prior to January 1973, appellee's sister was a recipient of public assistance on the state Home Relief Program. The Taylor's shelter cost was apportioned between the two programs, $110 per month (⅔ x $165) for appellee and her minor child from AFDC and $55 per month (⅓ x $165) for appellee's sister from Home Relief (A. 112).

In January 1973, Virginia Taylor's Home Relief was discontinued by the Nassau social services agency for failure to provide information concerning her eligibility (A. 262-263). This determination was not appealed in a state fair hearing and was not challenged below (A. 112).

The shelter allowance of appellee and her minor child was continued at the same level (⅔ x $165, or $110 monthly) under § 352.30(d) representing the fact their pro-rata shares of the allowed rent as previously established and did not change by reason of the sister's change in status. Appellee then requested that the shelter allowance for herself and her child be recomputed to provide a maximum allowance for a public assistance group of two ($145 per month) without pro-ration. Her request was refused by the Nassau social services agency, and that

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(footnote continued from preceding page)

did not allege during the proceedings below that either she or her sister had made any effort to locate an apartment within the shelter allowance maximum.

In his affidavit to the three-judge court, Marvin Rachlin, Executive Assistant to the Commissioner of the Nassau County Department of Social Services, describes some special difficulties encountered by that community in establishing appropriate shelter allowance maximums. He states in part that in the absence of county-wide rent control or "stabilization," increases in scheduled maximums have simply resulted in increased rents without cognizable benefit to recipients. A County survey conducted prior to July 1970 showed that 17.6% of the caseload was paying rent in excess of the scheduled maximums. On July 1, 1970 a new schedule with higher maximums was adopted. A County survey conducted just after the adoption of the new maximums showed that the percentage of the caseload paying in excess of the maximum had increased to 18% (A. 264, 265).

agency's action was sustained after fair hearing (A. 112-113, 120-121).

Effective March 14, 1974 Virginia Taylor was restored to public assistance on the Aid to the Disabled Program (A. 262). On or about January 1, 1974, her case was transferred to the federal SSI Program. Appellee Taylor did not allege below that her sister had failed to pay her pro-rata share of shelter cost at anytime following her restoration to public assistance or that her sister was in jeopardy of losing her assistance payments.*

Appellee Otey

Appellee Otey receives public assistance for herself and her minor child on the AFDC program. Their benefits include a shelter allowance.

Appellee and her minor child live in an apartment in Freeport, New York, in Nassau County, consisting of a living room, kitchen, two bedrooms and bath. The rent is $145 per month. The maximum shelter allowance in Nassau County for a two to four room apartment accommodating two people is $145 per month. During the period Mrs. Otey lived alone with her minor child, they received the maximum allowance, or the equivalent of the rent (A. 228-229; Dfts. Ex. "B", Nassau County Schedule, A. 556).**

On or about October 1, 1972, Michael Otey, appellee's adult son, age 24, came to reside with appellee and her

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* 42 U.S.C. § 602(a)(22) (effective, January 1974) precludes co-operative budgeting between AFDC and SSI beneficiaries. Accordingly, appellee Taylor and her minor child may receive up to the shelter allowance maximum appropriate for the number of rooms for a two person assistance group, i.e. $145 per month under the Nassau County Schedule. Dfts. Ex. "B", Nassau County Schedule (A. 556).

** The 1971 N.Y.D.S.S. study shows the mean shelter cost for a public assistance group of two persons in Nassau County as $141 per month. Dfts. Ex. "D", Table 3 (A. 619).

minor child. He remained there until February 1, 1974 when he obtained public assistance for himself on the State Home Relief Program and left to reside independently (A. 229, 230).

During the period of his residence with appellee, Michael Otey had occasional jobs. He did not pay any portion of the rent or make any contributions to appellee or her minor child (A. 229).

On or about October 26, 1972, the Nassau social services agency advised appellee that the shelter allowance would be pro-rated by ⅓ pursuant to § 352.30(d) to reflect Michael Otey's share of shelter cost. The pro-ration became effective on February 1, 1973 when appellee failed to appear at a state fair hearing she had requested (A. 229).

In the belief that appellee and her minor child were threatened with eviction, the Nassau social services agency advanced Mrs. Otey $45 to be recouped from the March, 1973 "basic" grant. The recoupment was held invalid at a state fair hearing on the ground that appellee was not, in fact, threatened with eviction (A. 126-128, 229-230).

Applicants for Intervention

Phyllis D'Alessio, Loretta Clark and Francesca Aloise applied for intervention on behalf of themselves and their minor children during the proceedings below (A. 41-42, 56-57, 205-206). Their applications were denied on the ground they were members of the class and not in need of immediate relief (A. 86-88).* However, Phyllis D'Alessio testified at the evidentiary hearing before the three-judge court and the facts in support of her claim are treated at some length in the opinions (A. 642-644). They are therefore reviewed below. The facts in support

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* Mrs. Aliose's application was denied during the course of the hearing on June 26, 1974 without specific comment (Original Transcript, p. 180).

of Mrs. Clark's and Mrs. Aloise's claims are reviewed briefly.

Phyllis D'Alessio

Mrs. D'Olessio receives AFDC for herself and her two minor children, including a shelter allowance.

The D'Alessios reside in an apartment in Mount Vernon, New York, in Westchester County. The apartment consists of a living room (12′ x 14′) master bedroom (12′ x 15′) children's bedroom (8′ x 10′) kitchen (9′ x 13½′) bath and an additional room (5′ x 6′) in which Mrs. D'Alessio keeps a refrigerator (A. 236). The rent is $175 per month, and the D'Alessios receive a shelter allowance equal to that amount (A. 46-47).*

On or before January 1, 1973, H.M., a male friend came to reside with the D'Alessios (A. 46, 53).** H.M. has had occasional employment and has received unemployment compensation but has not paid any portion of the rent (A. 47, 271).*** Mrs. D'Alessio contends that both she and H.M. have been ill from time to time and assist each other with the children and household chores during these periods (A. 44, 270-271).

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* The maximum shelter allowance in Westchester County for a two bedroom apartment accommodating a public assistance group of 3-4 persons is $182.00 per month. The 1971 N.Y.D.S.S. study shows the mean shelter cost for a public assistance group of three persons in Westchester County as $145.00 per month. Dfts. Ex. "D" Table 3 (A. 619).

** At the evidentiary hearing, Mrs. D'Alessio disputed the social services agency's allegation as to the date when H.M. came to live with her on a permanent basis (A. 234-286). However, she conceded that he did live with her after she had won her case in court (A. 284). The reference is to Judge Bauman's opinion dated October 3, 1973 (A. 91).

*** H.M. has apparently resided with the D'Alessios intermittently since 1966 (A. 44). In 1970, he bought Mrs. D'Alessio a bedroom set and a china cabinet (A. 294).

After verifying to its satisfaction that H.M. was residing with the D'Alessios and that he had failed to pay any portion of the rent, the Westchester social services agency advised Mrs. D'Alessio that the shelter allowance would be pro-rated by 1/4 ($43.60) from March 1, 1973 forward to reflect H.M.'s share (A. 53-55; Plfts. Ex. "J" A. 274, 488 and Plfts. Ex. "K" A. 275, 490).

At the June 26th the hearing Mrs. D'Alessio testified in part that she would not ask H.M. to pay his share of the rent because he had recently been released from a three week hospital stay and was unable to work (A. 286);* that H.M. was "[f]ully aware" of the availability of public assistance in New York but wanted "nothing to do with [it]" (A. 287); and that if the shelter allowance were in fact pro-rated, she would make-up H.M.'s share of the rent from the three person "basic" grant provided for herself and her two minor children (A. 276).

Loretta Clark

Mrs. Clark receives AFDC for herself and her five minor children including shelter and fuel allowances.

The Clarks live in Buffalo in Erie County. Their shelter allowance, $75,00, and fuel allowance, $18.20, are the equivalent of actual cost (A. 48-65, 237-239).** The maximum shelter allowance for a public assistance group of six persons in Erie County is $167.00 per month without heat (effective June 1, 1974). Dfts. Ex. "B", Erie County (A. 522).

The Clarks non-paying lodger is a male friend, S.R., who has resided with them since at least December 2, 1973, and

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* Mrs. D'Alessio provided no explanation for why she had not requested or H.M. had not paid his share of the rent in the past although in her initial affidavit she described him as "performing various jobs" to support himself "such as a truck driver's helper, locker room attendant and a golf caddy" (A. 46).

** The 1971 N.Y.D.S.S. study shows the mean shelter cost for a public assistance group of six persons (without fuel) in Erie County as $105.00 per month. Dfts. Ex. "D", Table 4 (A 619).

who is alleged to be unemployed. Effective January 1, 1973, the Erie social services agency advised Mrs. Clark that the shelter and fuel allowances would be pro-rated to reflect S.R.'s in share. The agency's determination was confirmed after a state fair hearing (A. 63-65).

Francesca Aloise

Mrs. Aloise shares a two bedroom apartment with her two sons, Mario and Carmine, in Brooklyn, New York. Carmine is over 18 years old, is not a student, and is employed.* He has refused to pay any portion of the rent (A. 206-207).

Prior to November 28, 1973, the Aloises received a "basic" grant for a three person assistance group and a shelter allowance of $160.50 per month, the equivalent of the rent (A. 207-209, 212).** On November 12, 1973, the New York City social services agency advised Mrs. Aloise that Carmine would continue to be included in the budget and that all his earnings would be treated as income to the assistance group (A. 207, 209). As a result of a state fair hearing, the New York City determination was reversed. Carmine's needs were excluded from the public assistance budget, and the previously established shelter allowance was pro-rated to reflect Carmine's share (A. 211-214).

The shelter allowances of the named appellees and the D'Alessio and Clark applicants for intervention were con-

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* 42 U.S.C. § 606(a) defines a needy child as one who, *inter alia*, is "under the age of eighteen" or "under the age of twenty-one and . . . a student. . . ."

** New York City has no fixed shelter minimums. Dfts. Ex. "B", New York City Schedule (A. 552-561). The 1971 N.Y.D.S.S. shows the mean shelter cost for a public assistance group of three persons in Brooklyn as $98.00 per month. Dfts. "D," Table 2 (A. 615).

tinued without pro-ration *pendente lite* (A. 87-88). As a result of the judgment and order of the three-judge court (A. 661-663) and the denial of appellants' application for stay pending this appeal, the local social services districts have been directed to cease the pro-ration of shelter allowances pursuant to § 352.30(d) effective August 15, 1974.

C. Proceedings Prior to Remand

Hurley v. *Van Lare* and *Taylor* v. *Lavine* were commenced as separate civil rights actions for injunctive and declaratory relief and for damages in the form of retroactive public assistance benefits.

Hurley was commenced in the United States District Court for the Southern District of New York on August 11, 1972 and assigned to the Hon. Arnold Bauman. An amended complaint was filed on September 1, 1972 (A. 15-28). *Taylor* was commenced in the Eastern District of New York on May 16, 1973 and assigned to the Hon. Jack B. Weinstein.

Both cases were brought by AFDC recipients who challenged the non-paying lodger provision of § 352.30(d) as inconsistent with the Social Security Act § 401 *et seq.*, 42 U.S.C. 601 *et seq.*, and the federal "substitute parent" regulation, 45 C.F.R. § 233.90(a) (A. 25, 116-118) and as violative of their rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment (A. 25-27, 118-119).* In support of their statutory claims, appellees contended that the pro-ration of shelter allowances upon a factual finding that a non-paying lodger was sharing shelter with recipients conclusively presumed that

* The Hurley amended complaint raised two additional constitutional claims, violation of the female recipients' rights to privacy and free association and sex discrimination (A. 26-27). These claims erroneously relied on § 352.31(a)(3)(iv) as the operative regulation. They were rejected by district court majority opinion (A. 654-655) and rendered moot by the recent amendment to § 352.31. See p. 5, *ante* and Ex. "1" pp. 3a-4a).

the lodger was contributing to the shelter needs of the recipents in violation of their rights under § 402(a)(10) of the Social Security Act, 42 U.S.C. § 602(a)(10), and § 233.90(a) of the federal regulations (A. 25, 116-118). In support of their constitutional claims, appellees contended that the conclusive presumption urged in support of their statutory claims also violated their rights to due process of law (A. 27, 118) and that classification established by § 352.30(d) between recipients who share shelter with non-paying lodgers and those who have no lodgers violated the former recipients' rights to equal protection of the laws (A. 25-26, 118-119).

The *Hurley* action was heard first by District Judge Bauman on appellees' motion for summary judgment on both the statutory and the constitutional claims (A. 29-31) and on appellees' motion to dismiss for lack of subject matter jurisdiction or, in the alternative, for summary judgment in their favor on the statutory claims (A. 66). Judge Bauman found that appellees' due process claims were sufficient to vest the court with subject matter jurisdiction and then proceeded to determine the statutory claims without convening a three-judge court. *Rosado* v. *Wyman*, 397 U.S. 397, 403 (1970). He granted appellees' motion for summary judgment, reading §§ 352.30(d) and 352.31(a)(3)(iv) as "man-in-the-house" rules which "conclusively presume that the lodger is contributing to the family's income" (A. 83). The court rejected appellants' arguments that the "regulations merely prorate the rent among eligible persons and compute the shelter allowance accordingly, leaving the lodger and non-eligible to pay his own way" (A. 84-85). Judge Bauman also granted class action status (A. 75-78),* denied retroactive welfare

* Judge Bauman originally defined the class as "all residents of the State of New York who are or were receiving public assistance, who have had their grants reduced, terminated, suspended

(*footnote continued on following page*)

benefits (A. 88-90) and denied the D'Alessio and Clark applications for intervention (A. 86-88).

Several days after Judge Bauman's opinion in *Hurley*, Judge Weinstein issued his memorandum and order in *Taylor* adopting Judge Bauman's reasoning in relevant part (A. 140-143).*

On appeal to the Second Circuit, the actions were consolidated, *sub nom. Taylor* v. *Lavine*, and the decisions of Judge Bauman and Judge Weinstein on the statutory claims were reversed. (FRIENDLY, HAYS, C.J.J., OAKES, C.J. dissenting A. 170, 184).

Writing for the majority, Circuit Judge Hays recognized that the shelter needs of the recipients could be properly distinguished from that of the non-recipient lodger; that per-share shelter cost would diminish upon the addition of a lodger since the rental cost for the entire dwelling remained constant; and that appellants' obligation under the Social Security Act and § 233.90(a) was limited to meeting the shelter needs of the recipients, not the lodger who had not qualified for assistance. He stated in part (A. 168-170):

(*footnote continued from preceding page*)

or denied, or who are threatened with reduction, termination, suspension or denial, solely because of the enforcement of 18 N.Y.C.R.R. § 352.31(a)(3)(iv) and § 352.30(d)" (A. 95-96). On December 18, 1973, Judge Bauman signed an Amended Judgment and Order at the request of appellants and with the consent of appellees which defined the class as follows: "All residents of the State of New York who are or were or will be receiving public assistance, and who have had their grants of public assistance, reduced, terminated, suspended or denied, or who may be threatened with reduction, termination, suspension or denial of public assistance solely because of the presence of a non-contributing lodger in the home pursuant to 18 N.Y.C.R.R. §§ 352.31(a)(3)(iv) and 352.30(d).

* No class was defined in *Taylor*, and it appears that Judge Weinstein considered the *Taylor* plaintiffs within the class defined in *Hurley* (A. 142).

> Section 352.30(d) does not attribute a non-existent obligation of support to the lodger, nor does it deny the AFDC—recipient children or caretaker their actual share of housing expenditures. Pro rating housing costs between the recipient and the non-recipient simply reflects the separability of need of the AFDC—eligible family members from the needs of persons who have not demonstrated their eligibility for public assistance.
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> Pro rating housing expenses among recipients and non-recipients of public aid accounts for the economies of scale that are realized when individuals live in groups; per individual costs decrease when the number of individuals living together increases.
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> The objective of § 352.30(d) is to insure that all of the beneficiaries of an AFDC grant are entitled to enjoy it. Unlike the Alabama and California regulations [invalidated in *King* v. *Smith*, 392 U.S. 309 (1968) and *Lewis* v. *Martin*, 397 U.S. 552 (1970), respectively], the New York regulations do not cut off all aid to families having non-eligible persons in their households. They merely prevent non-eligible persons from benefiting from free living space. New York's interest in preventing non-eligible persons from sharing AFDC benefits is co-extensive with the federal interest in allocating AFDC appropriations only to eligible persons. Section 402(a)(10) of the Social Security Act, 42 U.S.C. § 602(a)(10) (1970), states that aid must be furnished "with reasonable promptness to all eligible individuals," language necessarily implying that aid should not be furnished to non-eligible individuals. [Footnotes omitted.]
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In dissent, Judge Oakes acknowledged that the "State is not required . . . to extend AFDC benefits to ineligible persons" but nonetheless found that § 352.30(d) "with-

holds benefits from those rightfully entitled'' rather than precluding public subsidy of the shelter needs of "ineligible" lodgers. His conclusion rests on two erroneous assumptions: First, he assumed that the dwelling is the legal and factual responsibility of the recipients regardless of how many other individuals also reside there and therefore concluded that the recipients must be entitled to a shelter allowance equal to the allowed rent for an entire apartment (A. 179-180). Second, he assumed that once the recipients receive this shelter, or ''apartment,'' allowance,'' it becomes their property or ''resource'' to dispose of as they see fit (A. 180-181). Indeed, Judge Oakes seriously undercut his own argument by recognizing that the lodger's use of the recipients' shelter ''resource'' constituted a diversion of shelter allowance which could be recovered in an action against the lodger.*

As a result of the Second Circuit decision on the statutory claims, the actions were remanded to a three-judge district court to hear and determine the constitutional claims initially alleged (A. 170).

Appellees' petition for rehearing containing the suggestion that the appeal be reheard *en banc* was denied on June 13, 1974 (A. 185-186).

This Court granted appellees' petition for certiorari on December 9, 1974.

D. Proceedings on Remand

On June 26, 1974, the constitutional claims were heard by a three-judge district court consisting of District Judges

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* Section 352.30(d) fulfills exactly this purpose by prohibiting the lodger from obtaining the benefits in the first instance. If Judge Oakes' suggestion were followed, the local social services districts would be obliged to include the lodger in the public assistance budget for the purpose of bi-monthly shelter allowance payments only to bring suit against him the next day on the theory that the allowance had been diverted and/or that an over-payment had been made (A. 181).

Bauman and Weinstein, the convening judges in *Hurley* and *Taylor,* respectively and Circuit Judge Hays, the author of the Second Circuit majority opinion. Pursuant to Judge Weinstein's suggestion, an evidentiary hearing was held (A. 267-362).

At the hearing, appellees offered the testimony of Phyllis D'Alessio (A. 268-295), Dr. Herbert J. Gans, a sociologist and planner (A. 295-316), and Paul Davidoff, an urban planner (A. 316-340) together with numerous affidavits and exhibits (A. 231-256, 363-521). Appellants offered the affidavit and testimony of Linda Harmon, a Senior Program Analyst with N.Y.D.S.S. in the Bureau of Program Development (A. 257-260, 342-356), and the affidavit of Marvin Rachlin, Executive Assistant to the Commissioner of the Nassau County Department of Social Services (A. 261-266)* together with the shelter allowance schedules of the 58 local social services districts (Dfts. Ex. "B", A. 522-603); an HEW guide for determining the needs of public assistance recipients (Dfts. Ex. ''C'', A. 604-613); a 1971 N.Y.D.S.S. study of the shelter costs of recipients (Dfts. Ex. ''D'', A. 614-619); and an exchange of letters between N.Y.D.S.S. and HEW wherein HEW specifically approved § 352.30(d) (A. 620-623).**

If appellees' purpose at the hearing was to establish that the pro-ration of shelter allowances pursuant to § 352.30(d) had a constitutionally proscribed impact on the public assistance group and/or that it raised certain irrebuttable presumptions which were contrary to fact, they failed to

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* The affidavits were offered in lieu of direct examination. Cross-examination of Mr. Rachlin was waived (A. 361).

** Appellants offered the testimony of Carol Yvonne Rasberry, one of Mrs. Hurley's caseworkers, to support their claims of ''contributions'' to the Hurleys by their non-paying lodger. Mrs. Rasberry was not permitted to testify (A. 359).

meet their burden of proof.* If their purpose was simply to describe living arrangement among the poor, that description was not relevant to the legal issue presented and even if deemed relevant, the proof did not show that the pro-ration of shelter allowances had any cognizable effect on such arrangements.

The majority of the district court (per WEINSTEIN, D.J.) sustained appellees' due process challenge to § 352.30(d) (A. 639-656). Circuit Judge Hays dissented in conformity with the views expressed in the Second Circuit majority opinion (A. 657-663).

The district court majority agreed with appellants that the state's obligation under the AFDC program was limited to determining the "actual needs" of recipients as distinguished from those of the non-recipients (A. 641, 652). They also agreed that the classification established by § 352.30(d) between recipients who share shelter with non-paying lodgers and those who did not served the "constitutionally appropriate" objective of allocating "scarce welfare resources where they are most needed" (A. 655). The majority nonetheless found that the regulation raised two alternative irrebuttable presumptions which violated appellees' rights to procedural due process: first, recipients with a non-paying lodger need less housing space for their

* Appellees sought to prove in part that accepting a lodger did not indicate that recipients had more space than they could conveniently use for themselves (A. 305-306, 328). The argument derives from a reference in Judge Hays' Second Circuit opinion that the presence of the lodger raised a "fair inference" that the public assistance group "needs less space for its own use than it is paying rent for" (A. 168). As Judge Oakes noted in dissent, appellants never alleged that § 352.30(d) rested on any assessment of space or that public assistance groups who share shelter with lodgers have more space than those without lodgers (A. 176-177). Appellants made no such allegations before the district court on remand (A. 318). Nontheless, the district court majority cites the "extra space" argument as a presumption relied upon by the State (A. 12-14).

use than they are paying rent for and therefore need less money to pay for less space;* and second, that recipients with a non-paying lodger somehow need less money to pay their own, *pro rata,* share of the rent (A. 641-642, 651).

The majority then found that the due process violations could be cured by making the presumptions "rebuttable" at a state fair hearing where the public assistance group could prove that their individual circumstances were contrary to the allegedly presumed facts (A. 652). Judge Weinstein listed five factors to be considered at the hearings: whether the presence of the lodger in fact diminishes the recipients' shelter needs (A. 653); whether a reduction in the shelter allowance would have an adverse effect on the dependent child; whether the lodger "helps hold" the recipient group together; whether the lodger can or will contribute his share of shelter cost; and whether his presence "saves the state money" (A. 642).

The majority found the state interest in the non-paying lodger provision of § 352.30(d) "constitutionally appropriate" but found it unnecessary to articulate a separate equal protection ground of decision because it "analytically" "overlaps" the due process claim (A. 655). The $15 and $60 (boarding lodgers) income exemptions applicable to recipients with contributing lodgers were considered "anomalies" (A. 653-654). The judgment and order defined the appellee class to include recipients with contributing as well as non-paying lodgers and provided for injunctive and declaratory relief against § 352.30(d) in its entirety apparently relying on the finding that the exemptions were anomalous (662).

* As noted at p. 26 *ante,* § 352.30(d) makes no assumptions about how much space the public assistance group has. It simply allocates the fixed cost of a given amount of space among those who have the beneficial use of it.

In dissent, Judge Hays noted initially that the "presumption" of contribution rejected by the Second Circuit was the same "presumption" claimed before the district court. Accordingly, he found the rationale of *Taylor* v. Lavine controlling (A. 657-658, 660 n. 1).

Judge Hays then found again that the regulation did not depend on any presumption contrary to fact (A. 657, 658, 659):

> The challenged regulation . . . is not unconstitutional. It sets up no "irrebuttable presumption . . . not necessarily or universally true in fact." *Vlandis* v. *Kline,* 412 U.S. 441, 452 (1973).
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> [The Second Circuit in *Taylor* v. *Lavine*] reasoned that prorating shelter costs between AFDC-eligible and non-eligible members of a household insures that AFDC funds are disbursed only to individuals who have demonstrated their need for assistance. It found that the New York regulation is reasonably justified by considerations such as the severability of individual needs, the divisibility of space, and the economies of scale that result from combining small living units into larger groups [.]
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> If the lodger is financially able to contribute to the cost of maintaining the household, New York surely does not offend due process by abating the shelter allowance of the AFDC recipient pro rata according to the lodger's share. If the lodger is not financially able to contribute his share, New York permits him to establish his separate eligibility for public assistance.
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> Any "presumption" of the lodger's means may be refuted at the lodger's initiative in the same forum in which the AFDC recipient was initially required to establish a need for aid. The "conclusive presumption" denounced by the majority is the same "presumption" that attaches to every member of our society: that he is able to pay his own way until and unless he demonstrates the contrary. If the lodger is eligible for public assistance but does not apply, his silence cannot be put at the state's door. If the lodger is too proud to accept welfare—Mrs. [D'Alessio's] testimony indicates that such was Mr. M's motive for not applying for aid—then he ought to be too proud to accept aid from the state indirectly through the eligible AFDC recipient. A non-contributing lodger like Mr. M. has and eats his public assistance cake without demonstrating his need.

On the majority's choice of the recipients' fair hearings as an "alternative means" to the use of "presumptions," Judge Hays commented (A. 659):

> The majority states that the aid recipient's "Fair Hearing" . . . is a "reasonable alternative means" for determining the amount a lodger is willing or able to pay toward the cost of housing. But this statement glosses over the obvious difficulty of determining the means or intent of a person who has not put his affairs before the Social Services Department by applying for public assistance. In none of the recent Supreme Court due process cases cited by the majority did the reasonable alternative means of fact finding entail intrusion into the affairs of any person who did not apply for or seek a governmentally administered benefit or right.
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> In any event, the procedure . . . sanctioned by the majority . . . is surely no less conducive to "familial disintegration" than requiring the lodger to demonstrate his need on his own application.

Judge Hays concluded (A. 659-660):

> While assailing the rationality of section 352.30(d), today's majority embraces irrationality. It creates a unique class of persons who may receive the benefit of state aid without demonstrating any need for such aid. . . . It prefers lodgers in AFDC households over the eligible AFDC recipients themselves, since the latter must bear the burden of demonstrating their eligibility. In our complex society there are no simple means of indentifying households in need of state assistance, or of allocating the limited stock of resources among individuals who have demonstrated a need for such assistance. Section 352.30(d) is a valid attempt by New York to make such an allocation and it ought to be upheld.

On December 9, 1974, this Court noted probable jurisdiction but denied appellants' application for a stay of the judgment and order of the three-judge district court pending the disposition of the appeal in No. 74-453.

On January 13, 1975, this Court granted a joint motion to consolidate its review on certiorari in No. 74-5054 with the appeal from the judgment and order of the district court in No. 74-453.

Summary of Argument

Section 352.30(d) provides shelter allowances to public assistance recipients in direct proportion to their needs in dwellings shared with non-paying lodgers. As a non-recipient, the lodger is not entitled to have his shelter need met with public assistance funds either directly or indirectly. As an individual who is in fact sharing shelter with recipients to whom he owes no legal duty of support and who owe him none, the lodger's shelter need is properly defined as a proportionate share of the allowed rent on the dwelling in which he actually resides. Section 352.30(d)

combines these principles by apportioning the allowed rent in equal shares among the non-paying lodger and the recipients and providing shelter allowances for the recipients' shares, or shelter needs. As a result, each New York recipient who shares a dwelling with a non-paying lodger receives a shelter allowance under § 352.30(d) equal to 100% of his *per capita* standard of need just as recipients without lodgers. No New York recipient, with or without a lodger, receives a flat shelter grant.

Of necessity, the adoption of the criterion "non-paying" lodger and the use of a pro-ration formula which excludes that share from public assistance leaves the lodger's shelter need unmet. This result is consistent with the lodger's status as a non-recipient. It does not "presume" that he has "contributed" to the needs of the recipients he has no obligation to support in an amount that he did not in fact pay. It does not "presume" that the recipients have in fact received the non-existent "contribution." It simply reflects the obligation of the state and local social services districts to provide assistance only for the shelter needs of recipients as distinguished from those of non-recipients. Since New York provides public assistance to everyone whose income falls below the standard of need, a non-paying lodger who is unable to pay his own shelter cost can obtain assistance by demonstrating his eligibility.

As the Second Circuit held in *Taylor* v. *Lavine*, § 352.30 (d) implements rather than opposes federal AFDC legislation requiring that aid must be furnished to meet the needs of all eligible individuals. That legislation necessarily recognizes that the non-paying lodger is not an "eligible individual" and thus no aid must be furnished to meet his needs. It recognizes as well that when eligibles choose to live with non-recipients, the eligibles' needs are properly assessed in light of their actual circumstances rather than on the theory that the eligible is responsible for the needs of the entire group. It would

be just as offensive for the state to hold the recipients responsible for the lodger as it was to hold that the "lodger" responsible for the recipients in *King* v. *Smith*, 392 U.S. 309 (1968). The non-paying lodger provision fulfills just this purpose by considering recipients and non-recipients as the independent people they are in fact and in law. It was affirmatively approved by the HEW Region II Commissioner as consistent with federal regulations prohibiting reduction in need on the basis of "presumed" income.

Section 352.30(d) does not offend either the Equal Protection Clause or the Due Process Clause.

For equal protection purposes, appellees would distinguish between recipients who share shelter with non-paying lodgers and those who have no lodgers. In fact, recipients in both categories receive allowances equal to their *per capita* shares of the allowed rent. However, in the former category the non-recipient, lodger's share is excluded from assistance while in the latter (given groups of equal size), the recipient's share is provided. At best, the challenge is directed to the assessment of needs on the basis of the fact that the dwelling is shared or the effect on the level of assistance occasioned by exclusion of the non-recipient's share and is only properly considered under the traditional "reasonable relation" test. The principal state interests involved are readily apparent: the conservation of limited public assistance funds for those who are qualified and the avoidance of public subsidies of the shelter needs of non-paying lodgers who have not qualified. A classification defined in terms of the non-recipient status of the lodger and his own shelter need, or share, of the allowed rent is demonstrably a "reasonable means" of achieving these legitimate objectives.

The due process claim relies on the wholly inappropriate application of the "irrebuttable presumption" doctrine. That doctrine is not applicable to a classification which

adopts the same characteristics as the legislation it implements or complements, herein the non-recipient status of the lodger and the fact that shelter is shared, and the legislation is not itself challenged as unconstitutional. Further, it is not applicable when the characteristics adopted in defining the classification are precisely tailored to legitimate state interests, and a "hearing" is provided to any affected individual to resolve the issues which determine whether he has been properly excluded or included in the class.

Even if the doctrine is applied, the non-paying lodger provision of § 352.30(d) must be sustained. It rests on the "necessarily" and "universally true" facts that the shelter is shared and that the lodger as a non-recipient is not entitled to have his shelter need met with public funds. Given the determinative quality of these facts, a further, more expanded hearing would reach the same result as the hearing already provided.

To reject this proposition and require the payment of the lodger's share from public funds carries certain "irrebuttable presumptions" of its own. It "presumes" that the state (or the recipients) owes the lodger a duty of support when it in fact does not. It "presumes" that shelter allowances, once established, cannot change, regardless of how many individuals are added to or subtracted from the dwelling with the result that recipients who "lose" their lodger cannot obtain the allowed rent even if they occupy the entire dwelling. It "presumes" that if the recipients move to the "lodger's" home, they are not responsible for any part of that dwelling, as the "lodger" is not responsible in their home, and thus the recipients would receive no shelter allowances. Further, if the recipients are entitled to shelter allowances only to meet their own needs and those needs are defined as the allowed rent on the entire dwelling because the lodger has not in fact paid his share, then the lodger must either be "presumed" to have no shelter need at all or, if he has a shelter need,

it must remain unmet since only the recipients' needs have been provided.

The district court's application of the doctrine effectively amends the relevant legislation to add a new class of aided persons whose entitlement to benefits depends on an assessment of whether they are "good" lodgers or "bad" lodgers and not on whether they qualify under the standard of need or are willing to participate in the public assistance program.

The district court erred in refusing to allow evidence of substantial "contributions" of household furnishings to the Hurley appellees from their non-paying lodger just prior to the time he came to reside with them. This evidence, when coupled with the absence of any allegation that the lodger's financial circumstances had changed between the time of the "contributions" and the time he resided with the Hurley's, showed that the non-paying lodger in fact had the capacity to pay his share of shelter cost and illustrates the regulation's purpose in preventing public assistance shelter subsidies for those who are not truly needy.

The district court also erred in refusing to dismiss the claims of appellees Taylor and Otey as moot when they no longer shared dwellings with non-paying lodgers and the district court could not grant them any relief; the dismissal of the claims would not have mooted the action; and specifically identifiable members of the class were available to be substituted for those appellees.

To the extent that the district court defined the class to include recipients with contributing lodgers and declared the severable contributing lodger provision of § 352.30(d) invalid and enjoined its enforcement, the court acted at the instance of recipients who were not represented and on whose behalf no claim was made with the result that it disallowed a distinct and unchallenged portion of the regulation.

POINT I

The payment of public assistance shelter allowances to recipients in proportion to their actual number in dwellings shared with non-recipient, non-paying lodgers does not offend any provision of the Social Security Act or federal implementing regulations providing for Aid to Families with Dependent Children.

Section 352.30(d) distinguishes the shelter needs of recipients from those of the non-recipient, non-paying lodgers and provides the recipients with shelter allowances from public funds in direct proportion to their actual number in dwellings shared with one or more such lodgers. The regulation is part of the approved New York state plan under the AFDC program, and was specifically approved by the HEW Region II Commissioner during the course of this litigation* (A. 153-155; Defts. Ex. "E", A. 620-623). It conforms with, rather than opposes, provisions of the Social Secruity Act declaring the purposes of that program, defining the classes to be aided and recognizing the appropriateness of the distinguishing the separate needs of recipients who choose to live with non-recipients.

The declared purpose of the AFDC program is to provide assistance for "needy dependent children and the parents of relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain . . . capability for maximum self-support and personal independence consistent with . . . continuing parental care and protection. . . ." 42 U.S.C. § 601 (Ex. "2" p. 5a).** Aid must be furnished to

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* Section 352.30(d) also applies to the state financed Home Relief-Veteran Assistance program as do other state statutes and regulations regulating AFDC. Specific reference to Home Relief-Veteran Assistance are provided where appropriate given the relevance of that program to appellees' constitutional claims.

** Parallel citations to the Social Security Act are omitted in this portion of the brief to avoid unduly encumbering the text.

"all eligible individuals," 42 U.S.C. § 602(a)(10) (Ex. "2" p. 6a). An "eligible individual" is one who has "fully qualified" under the state standard of need, *Jefferson* v. *Hackney,* 406 U.S. 535, 545 (1972), and is within the class of aided persons defined by the Social Security Act. Those persons are "needy" dependent children, deprived of the support of at least one parent and living with either a parent or other specified caretaker relative, 42 U.S.C. § 606 (a) (Ex. "2" p. 7a), and the parent or caretaker relative. 42 U.S.C. § 606(c) (Ex. "2" p. 7a).

Thus, aid to families with dependent children is defined as payments or services to meet the needs of the "qualified" dependent child and, if necessary, the needs of the "qualified" parent or caretaker relative. 42 U.S.C. 606(b) (Ex. "2" p. 6a).• The Social Security Act has authorized only two additions to the aided class: unemployed fathers of otherwise dependent children, 42 U.S.C. § 607, and, at the option of a cooperating state, other individuals who live with the dependent child and who, in that state's judgment, are essential to the child's well-being. 42 U.S.C. §§ 602(a)(7), 606(b) (Ex. "2" pp. 5a, 6a-7a).•• These individuals must likewise qualify under the state standard of need.••• The "AFDC family" consists of these individuals and only these individuals. No provision of federal law requires that the definition of the aided class be expanded to include unqualified lodgers.

• The New York state plan parallels the federal statement of purpose and definitions of those to be aided. Social Services Law §§ 131(1), (3), 349(a), 350(1)(a) (Ex. "2" pp. 9a, 13a, 14a).

•• The New York state plan provides for both these additional categories of AFDC recipients. Social Services Law § 350 (Ex. "2" p. 14a); 18 N.Y.C.R.R. § 352.7(f) (Ex. "2" p. 15a).

••• Home relief defines the aided class as those unable to maintain themselves (as determined under the standard of need) who cannot secure support from responsible relatives and are ineligible for benefits under categorical assistance programs. Social Services Law § 158. It is the general, or residual, assistance category which insures that any New York resident who qualifies under the standard of need receives assistance. *New York State Department of Special Services* v. *Dublino,* 413 U.S. 405, 413 (1973).

The Social Security Act and unchallenged provisions of the New York state plan recognize that when recipients share living arrangements with non-recipients, AFDC must only be provided to meet the recipients' separate needs and not for the benefit of the non-recipients. See 42 U.S.C. § 606(b), (c) (Ex. "2" p. 7a) recognizing that caretaker relative and child may be living with other relatives and individuals who do not qualify for assistance and evidently contemplating that AFDC would be provided only to the extent of the caretaker's and child's needs; 42 U.S.C. § 602(a)(23) recognizing that "needs" involved are individual rather than household; Social Services Law § 131(4) (Ex. "2" pp. 9a-10a) applying standard of need to persons who are *members* of a family household; 131-a(1) (Ex. "2" p. 10a) applying standard of need to all items of need of persons who constitute or are *members* of a family household; 143-b providing for protective payments on behalf of recipients "for or toward" the rent on the apartment in which they reside. See Simplified Methods for Determining Needs, HEW 1964, Method III, setting forth procedure for determining the needs of recipients in households shared with non-recipients (A. 610-613). See *Williams* v. *Wohlgemuth,* 366 F. Supp. 541 (W.D. Pa. 1973), *aff'd* 416 U.S. 901 (1974) (needs of dependent child assessed and provided under AFDC even if relative is ineligible); *Gilliard* v. *Craig,* 331 F. Supp. 587 (W.D.N.C.) *aff'd* 409 U.S. 807 (1972) (invalidating reduction of AFDC grant to the extent of the child's income but allowing separation of that child's needs and *pro rata* reduction in grant); *Lopez* v. *Vowell,* 471 F. 2d 690 (1973), *aff'd* 411 U.S. 933 (1973) (needs of caretaker and dependent child assessed for AFDC notwithstanding inelibility of caretaker's spouse and other minor children with whom they lived); *Rodriguez* v. *Vowell,* 472 F. 2d 622 (5th Cir. 1973), *cert. den.* 412 U.S. 944 (1973) (needs of caretaker relative assessed for AFDC even if child is ineligible). *Boucher* v. *Minter,* 349 F. Supp. 1240, 1244 (D. Mass. 1972) (needs of dependent children sepa-

rated from those of parent who became ineligible upon remarriage); *Dullea* v. *Ott,* 316 F. Supp. 1273 (D. Mass. 1970) (dismissing as insubstantial a claim against classification in which recipients shared living arrangements with non-recipients and assistance was provided only for recipients' pro-rata shares).

Section 352.30(d) implements this fundamental distinction when recipients share shelter with non-paying lodgers. Under the approved New York state plan, shelter is a separate "item of Need." Social Services Law § 131-a(1), (2) (Ex. "2" pp. 10a-11a). See Simplified Methods for Determining Needs, HEW 1964, Method II treating shelter as a separate component of total benefits and Method III providing for separate treatment of shelter in shared households. Defts. Ex. "C" (A. 606-610, 610-611). Shelter "allowances," not "flat grants," are provided to meet those needs. Social Services Law § 131-a(3) (Ex. "2" pp. 11a-12a); 18 N.Y.C.R.R. § 352.3(a) (Ex. "2" pp. 14a-15a). Since all individuals living in a given dwelling are properly considered as sharing in the beneficial use of that space, each individual's shelter need is properly defined in terms of his *pro rata* share of the cost of the entire unit. If the individuals are public assistance recipients and occupy an entire dwelling their needs and thus their shelter allowances are the equivalent of the allowed rent, i.e., the "regular shelter allowance" under § 352.30(d).* When recipients combine with non-paying lodgers, the recipients continue to receive allowances equal to their proportionate shares of the allowed rent, and thus continue to meet their own shelter needs. The non-paying lodger is a non-recipient. He is not entitled to have his *pro rata* share of the allowed rent, or his shelter need, met with public assistance funds, and therefore no allowance is provided. Section 352.30(d) thus conforms with the Social Security Act by providing AFDC funds for qualified persons within the

* Each recipient in effect receives a separate shelter allowance for his own shelter needs. *Boucher* v. *Minter, supra.*

aided class defined by the Act in direct proportion to their actual shelter needs. As the Second Circuit held (A. 168): "Prorating housing costs between the recipient and non-recipient [pursuant to § 352.30(d)] simply reflects the separability of the need of the AFDC—eligible family members from the needs of persons who have not demonstrated their eligibility for public assistance." Compare *Shea* v. *Vialpando,* 416 U.S. 251 (1974) (invalidating Colorado regulation establishing uniform allowances for AFDC recipients' work related expenses in face of Social Security Act § 402(a)(7), 42 U.S.C. § 602(a)(7), requiring consideration of "any expenses reasonably attributable to the earning of . . . income"); *Carleson* v. *Remillard,* 406 U.S. 598 (1972) (invalidating California regulation which excluded continued absence for military service from definition of "continued absence from the home" under Social Security Act § 406(a)(1), 42 U.S.C. § 606(a)(1)); *Townsend* v. *Swank,* 404 U.S. 282 (1971) (invalidating Illinois exclusion of 18 to 20 year olds attending college or university from AFDC benefits in face of Social Security Act § 406(a)(2)(B), 42 U.S.C. § 606(a)(2)(B), defining dependent child, *inter alia,* as one between the ages of 18 and 21 who is regularly attending college or university); *X* v. *McCorkle,* 333 F. Supp. 1109 (D.N.J. 1970), *aff'd per curiam sub nom. Engelman* v. *Amos,* 404 U.S. 23 (1971) (New Jersey administrative ceiling on earned income did not consider statutory "disregards" as required by Social Security Act § 402(a)(8), 42 U.S.C. § 602(a)(8)).

The pro-ration of shelter allowances does not necessarily result in a "reduced" allowance to the AFDC public assistance group.* While appellee Taylor and her minor child

* The question presented on the Petition for Certiorari is No. 74-5054 erroneously characterizes § 352.30(d) as causing a *pro-rata reduction* "in the 'shelter allowance' of an AFDC family *solely because* of the presence of a non-legally responsible person in the home." (p. 2) (Emphasis added.)

received AFDC and appellee's sister received Home Relief, appellee and her child received shelter allowances of ⅔ of the allowed rent, and appellee's sister received a shelter allowance of ⅓ of the allowed rent. When the sister's Home Relief was discontinued and she became a lodger under § 352.30(d), appellee and her child continued to receive the *same* shelter allowances, ⅔ of the allowed rent reflecting the fact that their needs were neither diminished nor increased by reason of the sister's change in status. In Mrs. D'Alessio's example, her shelter needs and those of her two minor children were initially budgeted on the basis of their occupancy of the entire apartment, e.g. 3/3 of the rent. When H.M., the lodger, moved in, he *added* his own needs, or another share, and the D'Alessios' shelter needs were thereby reduced to ¾ of the rent. The rent was then pro-rated under § 352.30(d) to provide the D'Alessios with ¾ of the rent to meet their own needs and to exclude the needs of H.M. who was not entitled to a public assistance payment for his share. If the D'Alessios had a non-paying lodger when their shelter needs were initially budgeted (or a "lodger" who was a "recipient" on the Home Relief-Veteran Assistance program), their allowance would have been pro-rated (¾, ¼) at that time, and no "reduction" would have taken place. If the D'Alessios then "lost" that lodger, their shelter needs would have been rebudgeted, and their allowance increased.

To refuse to assess and compensate the shelter needs of recipients separately from those of non-paying lodgers provides the lodger with a public subsidy in the form of free shelter notwithstanding his failure to qualify. It places the non-paying lodger above the AFDC or Home Relief recipient who must to qualify under the terms of the respective programs, is subject to the continuing investigation of his eligibility (Social Services Law §§ 132, 134-a; 18 N.Y.C.R.R. Part 351) and obligated to repay the public funds advanced to him should he obtain the resources to do

so. 18 N.Y.C.R.R. §§ 352.11, .12, .15, .23, .25, .27, .28. See *Charleston* v. *Wohlgemuth*, 332 F. Supp. 1175 (E.D. Pa. 1971), *aff'd* 405 U.S. 970 (1972); *Snell* v. *Wyman*, 281 F. Supp. 853 (S.D.N.Y. 1968), *aff'd* 393 U.S. 323 (1969). It places recipients who share dwellings with non-paying lodgers in a better position than those who live with contributing lodgers since, under § 352.30(d), the contributing lodgers' payments above $15 per month ($60 for boarding lodgers) are income to the recipients and offset against the standard of need.

Given the consistency between the Social Security Act and state plans which do not maximize recipients' benefits, *Jefferson* v. *Hackney*, 406 U.S. 535, 543-544 (1972), and provide them with only "some aid," *Dandridge* v. *Williams*, 397 U.S. 471, 481 (1970), New York surely does not offend the Act by excluding unqualified, non-paying lodgers and providing AFDC recipients with funds in direct proportion to their needs at 100% of the *per capita* standard of need.

King v. *Smith*, 392 U.S. 309 (1968) and *Lewis* v. *Martin*, 397 U.S. 352 (1970) are not opposed. In both cases, the paramour or MARS was assumed to be meeting the needs of the AFDC recipients either entirely (*King*) or to the extent of his income (*Lewis*) on the basis of a fictitious legal obligation of support not shared by the community at large. *Gaither* v. *Sterret*, 346 F. Supp. 1095 (N.D. Ind.), *aff'd.* 409 U.S. 1070 (1972) (stepparent without duty of support); *X* v. *McCorkle*, 333 F. Supp. 1109 (D. N.J. 1070), *aff'd. per curiam sub nom. Engelman* v. *Amos*, *supra* (same); *Solman* v. *Shapiro*, 300 F. Supp. 403 (D. Conn.), *aff'd.* 396 U.S. 5 (1969) (same); *Rosen* v. *Hursh*, 464 F. 2d 731 (8th Cir. 1972) (same). Section 352.30(d) makes no assumption of support or "contribution" by the lodger to the recipients but merely distinguishes the shelter needs of one from the other in order to meet only the recipients

needs from public funds.* See opinion of HAYS, C.J. in the Second Circuit (A. 168). As this Court has noted, *King* and *Lewis*, like *Townsend* v. *Swank, supra,* and *Carleson* v. *Remillard, supra,* simply stand for the proposition that state law cannot exclude anyone from AFDC benefits who the Social Security Act expressly provides shall be eligible. *New York State Department of Social Services* v. *Dublino,* 413 U.S. at 421. Plainly, in excluding the non-paying lodger, § 352.30(d) excludes the same person the Act excludes.

To read *King* and *Lewis* as appellees suggest merely adopts the reciprocal of the assumption invalidated in those cases, a fictitious legal obligation of support owed to the paramour, the MARS and the lodger by the AFDC recipients and/or the AFDC program.

45 C.F.R. §§ 233.20(a)(3)(ii) and 233.90(a) are also not opposed. See generally Social Security Act § 402(a)(7), 42 U.S.C. § 602(a)(7). The regulations provide for the determination of the needs of applicants and recipients' on the basis of those individuals' resources. They do not, and could not, require that the recipients' needs be determined on the basis of the non-applicant and non-recipient lodger's alleged lack of resources. See 45 C.F.R. § 233.20(a)(1) (Ex. "2" p. 8a). The statement in 45 C.F.R. § 233.90(a) that the "inclusion in the family or the presence in the home, of a 'substitute parent' or

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* The facts alleged in support of Aloise application for intervention show that the principle established by *Lewis* v. *Martin, supra,* is not violated by § 352.30(d). Therein, the AFDC grant was initially reduced by the New York City social services agency to the extent of Mrs. Aloise's adult son's earnings (A. 207, 208) although he owed his mother and brother no duty of support, a clear violation of *Lewis*. At the state fair hearing, the local agency's determination was vacated and only the shelter allowance pro-rated to conform to § 352.30(d) reflecting the continuing AFDC eligibility of Mrs. Aloise and her minor child to the extent of their needs and the non-recipient status of the "non-responsible" adult son (A. 207, 211-214).

'man-in-the-house' or any individual [except one with a legal obligation of support] is not an acceptable basis for a finding of ineligibility or for assuming the availability of income. . . ." refers to the eligibility of the dependent child and the income "available" to that child to meet its *own* needs. It does not require that the child's needs be assessed to include those of the "substitute parent" or "man-in-the-house." See opinion of HAYS, C.J. in the Second Circuit (A. 167).

Even if the non-paying lodger provision of § 352.30(d) is not viewed as implementing the express terms and conditions of the Social Security Act, it must be sustained as complementary to the Act's purposes and thus "within the legitimate sphere of state administration." *New York State Department of Social Services,* 413 U.S. at 422 (sustaining New York Work Rules as complementary to a Work Incentive Program under Social Security Act); *Wyman* v. *James,* 400 U.S. 309 (1971) (sustaining New York "home visit" as appropriate means of ascertaining eligibility and suitability of dependent child's home environment although no such visits were specifically provided under the Act). Section 352.30(d) has been specifically approved by HEW (A. 153-155; Defts. Ex. "E", A. 620-623). It adopts qualified recipient status as determinative of whether a shelter allowance shall be paid for the benefit of an individual, the same condition of eligibility the Social Security Act itself imposes. That the approved New York State plan considers shelter as an allowed item of need and compensates only so much of that need as recipients in fact have, rather than providing "flat shelter grants" which may not consider the question of whether shelter is shared does not violate the Act. See *Jefferson* v. *Hackney* 406 U.S. at 539-545. (Social Security Act allows variance in determining needs and level of benefits and different results may obtain).

POINT II

The payment of shelter allowances to recipients in proportion to their actual number in dwellings shared with non-paying lodgers does not offend the recipients' rights to equal protection of the laws.

A. The appropriate equal protection standard is one of reasonable relation to a legitimate state interest.

The traditional equal protection test of "reasonable relation" to a legitimate state interest continues to be applicable to the review of classifications which affect the assessment of need and the level of benefits available under public assistance programs. *United States Department or Agriculture* v. *Moreno,* 413 U.S. 528, 533-538 (1973) ("equal protection" component of Fifth Amendment); *Jefferson* v. *Hackney,* 406 U.S. 535, 546-551 (1972); *Dandridge* v. *Williams,* 397 U.S. 471, 485-487 (1970). Accord, *Geduldig* v. *Aiello,* 417 U.S. 484, 485-495 (1974) (state disability insurance program); *Richardson* v. *Belcher,* 404 U.S. 78, 81 (1974) (Social Security—"equal protection" component of Fifth Amendment); See *King* v. *Smith,* 392 U.S. 309, 318, 319 (1970); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 488 (1955); *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961); *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 78 (1911).

Given the application of the "reasonable relation" test to classifications which either exclude the needs of qualified persons from public assistance or reduce their benefits, it is perforce applicable to Section 352.30(d) which excludes the needs of unqualified non-paying lodgers who are not entitled to any benefits. *United States Department of Agriculture* v. *Moreno, supra* (excluding households whose members were not all related from eligibility for food stamps notwithstanding household was qualified under the standard of need); *Jefferson* v. *Hackney, supra* (greater reduction in the level of benefits for qualified AFDC recipients than for qualified recipients under other categorical assistance programs); *Dandridge* v. *Williams, supra* (needs of youngest dependent children in large families excluded, or, conversely reduced AFDC benefits for large families notwithstanding eligibility of all members under the standard of need); *Geduldig* v. *Aiello, supra* (certain disabilities suffered by insured persons excluded from reimbursement); *Richardson* v. *Belcher, supra* (reducing eligible's Social Security in face of complementary Workmen's Compensation benefits).*

B. The non-paying lodger provision of § 352.30(d) bears a reasonable relation to legitimate state interests in the distribution of limited public assitance funds.

In distinguishing between recipients who have no lodgers and those who share shelter with non-paying lodgers, New York recognizes a significant factual difference in the allocation of shelter costs and achieves its interest in distributing limited public assistance funds to recipients in proportion to their actual shelter needs. Conversely, it achieves its interest in withholding benefits from individuals who have not qualified for them. These interests are patently legitimate. *New York State Department of Social Services* v. *Dublino,* 413 U.S. 405, 413 (1973); *Jefferson* v. *Hackney,* 406 U.S. at 537; *Dandridge* v. *Williams,* 397 U.S. at 472, 478. As the district court majority stated (A. 655): "The purported objective of this distinction is a constitutionally appropriate one since . . . New York may seek to allocate its scarce welfare resources where they are most needed."

Since the non-paying lodger must either have the capacity to pay his share of shelter cost, or lack such capacity, the regulation lessens the risk that the financially capable lodger will obtain free shelter at public expense

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* The district court majority found that the reasonable relation test was appropriate to § 352.30(d) (A. 655).

and that the "poor" lodger will choose to sustain himself from the "basic" grant provided for the recipients rather than obtaining his own assistance (both shelter allowance and "basic" grant) measured in terms of his own needs, matters equally within the state's legitimate interest.* Opinion of HAYS, C.J. in the district court (A. 658-659).

The non-paying lodger class is defined in terms of the non-recipient status of the lodger, his sharing a dwelling with recipients, and his failure to pay $15 per month. The pro-ration method divides the shelter allowance into shares equal to the number of persons actually residing in the dwelling. Each of these classifying characteristics is rational in itself and, when combined, requires a finding that the non-paying lodger provision of § 352.30(d) is a "reasonable means" of achieving the state interests involved.

There is no warrant under the traditional equal protection standard for a more exacting "means" test requiring examination of the classification for over-or under-inclusiveness. In the "area of economics and social welfare, a

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* The circumstances of the Hurley's, D'Alessio's and Otey's illustrate these interests. Appellants contend that the Hurley's lodger, A.D.R., was at all times financially capable. The contention is based on documentary evidence of numerous "contributions" of household furnishings made by A.D.R. to the Hurley's just prior to the time he became a non-paying "lodger" (A. 222-224) and the absence of any allegation that his financial circumstances changed while he lived with them. Pro-rating the shelter allowance in this case properly avoided public subsidy of A.D.R.'s share. Mrs. D'Alessio testified, in substance, that her non-paying lodger, H.M., was poor, and could not pay his share of the rent. It follows from her testimony that H.M. was also sustaining himself from the "basic" 3 person grant presently provided for Mrs. D'Alessio and her two minor children (A. 275-276). Given the availability of public assistance in New York to anyone whose income falls below the standard of need, H.M.'s conduct in this regard is neither necessary or appropriate. He should seek assistance on his own behalf as Mrs. Otey's son Michael in fact did just after he and his mother became aware of the implications of § 352.30(d). See *Facts ante*, pp. 15-16.

state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Dandridge* v. *Williams*, 397 U.S. at 485. So long as the state's judgments are rational and free from invidious discrimination, they must be sustained. *Jefferson* v. *Hackney*, 406 U.S. at 546. Accord, *Richardson* v. *Belcher*, 404 U.S. at 81. "For this Court to approve the invalidation of state economic and social regulation as 'overreaching' would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488. That era long ago passed into history. *Ferguson* v. *Skrupa*, 372 U.S. 726.'" *Dandridge* v. *Williams*, 397 U.S. at 484-485.

As demonstrated in Point I, the non-recipient status of the non-paying lodger and the fact that he is sharing shelter with recipients distinguishes the public assistance group with whom he resides from public assistance groups without lodgers in terms of the availability of public funds and in terms of the recipients' shelter needs (if the lodger was added to the public assistance group after the budget was established or subtracted from it). The state is not obligated to provide funds to recipients for the benefit of lodgers. Equally, the state is only obligated to provide shelter allowances to meet the shelter needs of recipients. Those needs are properly separable and defined in terms of the recipients' proportionate shares of the allowed rent on the dwelling in which they reside, not in terms of the entirety of a dwelling which is in fact shared with non-recipients. Thus, recipients who share shelter with non-paying lodgers do not have the same shelter needs as recipients who have no lodgers, and a classification based on these charactertistics is reasonable. Failing this distinction, the recipients must meet the shelter needs of the lodger or he must be "presumed" to have no shelter needs; or the "lodger" (if the recipients move to his home)

must meet the shelter needs of the recipients or they must be "presumed" to have no shelter needs. Since neither the lodger nor the recipient is legally responsible for the support of the other, it would be just as offensive for the state to adopt a policy that the recipient is responsible for the lodger's shelter needs as it was for Alabama and California to adopt a policy that a male lodger was responsible for the support of recipients. *King* v. *Smith,* 392 U.S. 409 (1968); *Lewis* v. *Martin,* 397 U.S. 552 (1970).

The adoption of a $15 per month payment as the "line" which distinguishes the non-paying from the "contributing lodger" is similarly "reasonable". The state is not obliged to acknowledge payments so small as to be unrealistic in light of housing costs or inconsistent with its purpose in obtaining the lodger's share. Equally, the "line" could not be set so high as to make it unrealistic to expect that payments would be forthcoming. In 1971, the average monthly shelter cost for a public assistance group of 4 was $113.00 Def. Ex. "D" (A. 614). A ⅕ (lodger's) share would therefore be $22.60. The $15 line is a fair approximation of that share particularly when it is recognized that on the "contributing" side of the regulation, the first $15 is treated as exempt income to encourage recipients to take in "contributing" lodgers, and only the balance is an income offset against the standard of need (A. 259-260), i.e. the higher the "line", the lower the income offset, the less benefit the state would derive from the lodger's payment. *Kahn* v. *Shevin,* 416 U.S. 351 (1974); *Dandridge* v. *Williams,* 397 U.S. at 485.

That recipients and their lodgers could "exchange" $15 monthly payments and thereby avoid pro-ration does not make the use of that amount to distinguish between non-paying and contributing lodgers irrational. See Second Circuit dissent (A. 175 n. 6); District Court majority (A. 653-654). Notably, the record is devoid of any evidence that such "exchanges" in fact occur. Nor is there any

suggestion that either the state or the local social services district would countenance the avoidance of the regulation in that manner. The "contributing" lodger who is in fact a "non-paying" lodger would simply be classified as a non-paying lodger, and the shelter allowance pro-rated. Alternatively, both the recipient and the lodger could be prosecuted under the penalties provision of the Social Services Law. Social Services Law § 145(1) (Ex. "2" p. 12a). Moreover, the logic of the "exchange" argument would apply to any line drawn in terms of dollar amounts between those who would obtain a benefit (recipients with contributing lodgers) and those who would not (recipients with non-paying lodgers) except one drawn at zero.

Pro-rating the shelter allowance in equal shares reflects the fact that all persons who share a common shelter may be expected to have equal (or approximately equal) access to and beneficial use of that shelter. The method was not challenged below and is consistent with the living arrangements described by appellees. Paul Davidoff, one of appellees' expert witnesses at the June 26th hearing, confirmed that expectation as reasonable when he testified that the beneficial use of a dwelling unit is fairly allocable among the number of people who live there (A. 337-338).

When these classifying characteristics are combined, the result under the § 352.30(d) is that each recipient in a dwelling shared with a non-paying lodger receives a shelter allowance in direct proportion to his individual share of the allowed rent.* If as this Court held in *Dandridge* v. *Willams,* 397 U.S. at 480, Maryland offends neither the Social Security Act nor the Equal Protection Clause by providing large AFDC families with "somewhat less than their ascertained per capita standard of need", New York surely does not offend the Equal Protection

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* For 93% of New York recipients, the shelter allowance equals full shelter cost (A. 258).

Clause by providing shelter allowances for all recipients with non-paying lodgers at 100% of the recipients' *per capita* standard of need, and § 352.30(d) must be sustained accordingly. Similarly the classification established by § 352.30(d) is no less reasonable than those sustained in *Geduldig* v. *Aiello, supra; Jefferson* v. *Hackney, supra.* Compare *United States Department of Agriculture* v. *Moreno, supra* (invalidating classification which excluded households which qualified in terms of need but whose members were not all related as irrational in terms of any legitimate governmental interests involved in the program.

C. The "contributing" lodger provision of § 352.30(d) bears a reasonable relation to the state interest in reducing grants and allowances by recipients' income and in encouraging recipients to take in paying lodgers.*

Section 352.30(d) provides that payments made by contributing lodgers over $15 per month ($60 per month boarding lodgers) shall be income to the recipient and offset against the recipient's standard of need.

The offset provision apportions shelter cost (or household expenses in the case of boarding lodgers) by reducing the public assistance benefits previously provided by the amount of the lodger's actual payments. The regulation makes one exception in favor of the recipients to the reduction-by-amount-of-contribution formula: the recipients may retain the first $15 ($60 for boarding lodgers) paid in any given month as "exempt" income.

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* Appellees' equal protection claim below was limited to the distinction between recipients who share shelter with non-paying lodgers and those who have no lodgers (A. 25-26, 118-119, 174, 655). Although the district court did not discuss the contributing lodgers provision except with respect to the potential for the "exchanges" of the exempted income (A. 653-654), the judgment and order defines the class to include recipients with both non-paying and contributing lodgers and declares both provisions of § 352.30(d) invalid and permanently enjoins their operation. Appellants have appealed from these two rulings. They are argued in Point VI, *post.*

To the extent that the contributing lodger provision offsets the lodger's payments as income, it directly implements Social Security Act § 402(a)(7), 42 U.S.C. § 602(a)(7) providing that "the State shall, in determining need, take into consideration any other income or resources of any child or relative claiming aid to families with dependent children . . ." 45 C.F.R. § 233.90(a) (Ex. "2" pp. 8a-9a); Social Services Law § 131-a(1) (Ex. "2" p. 10a). *King* v. *Smith,* 392 U.S. 309, 319 (1968). Accordingly, it must be acknowledged as valid. Opinion of Oakes, J. dissenting in the Second Circuit (A. 174 n. 5).

To the extent that the regulation adopts an "income exemption" as a means of encouraging recipients to engage in an income producing activity by taking in contributing rather than non-paying lodgers (A. 259-260), it follows the established practice of allowing the recipients to retain a portion of their "earnings" as an incentive. Social Security Act §§ 402(a)(8), 42 U.S.C. §§ 602(a)(8), 430 *et seq.*, 630 *et seq.;* Social Services Law § 349-a, *Shea* v. *Vialpando,* 416 U.S. 251 (1974); *Jefferson* v. *Hackney,* 406 U.S. at 539.

The $15 and $60 limits on the income exemption must be sustained "reasonable". *Kahn* v. *Shevin,* 416 U.S. 351 (1974) (applying "reasonableness" test to classification which discriminates in favor of a particular group). See discussion, p. 48, *ante.*

That in some cases the *bona fide* payment of the income exempt amount, or any amount that does not at least equal the lodger's fractional share of the allowed rent, results in the use of public funds for the lodger's benefit is consistent with the purpose of encouraging co-operative arrangements between recipients and their contributing lodgers, and a matter within the state's pre-rogative although not among its obligations under federal law. *Richardson* v. *Belcher, supra* (offset against Social Security less than amount of Workmen's Compensation received).

POINT III

The payment of shelter allowances to recipients in proportion to their number in dwellings shared with non-paying lodgers compensates recipients for their actual shelter needs and does not rest on any irrebuttable presumption in violation of the recipients' rights to due process of law.

Appellees do not claim that their rights to due process of law are violated by any provision of the Social Security Act or the New York Social Services Law defining the aided classes for AFDC or Home Relief—Veteran Assistance or recognizing that the needs of recipients may be separately assessed when they share living arrangements with non-recipients. They do not claim that the New York statutes treating shelter as an allowed "item of need" deny them due process of law.* As demonstrated in Point I, § 352.30(d) implements these statutes when recipients share shelter with non-recipient, non-paying lodgers. At the least, it complements the statutes by adopting qualified recipient status as a basis for assistance, the identical basis for assistance adopted by the statutes themselves. See discussion pp. 38-43, *ante*. Given this consistency between § 352.30(d) and statutes unchallenged under the Due Process Clause, the regulation itself cannot be found "so arbitrary and unreasonable" as to violate that Clause. *Heiner* v. *Donnan*, 285 U.S. 312, 325 (1932); *Schlesinger* v. *Wisconsin*, 270 U.S. 230, 239-240 (1926).

Equally, in view of the fact that § 352.30(d) bars *all* non-paying lodgers from public assistance benefits on the same basis as the statutes it implements or complements, it must be accepted as consistent with the Due Process Clause. *Bell* v. *Burson*, 402 U.S. 535, 539 (1971) (noting *inter alia* that if statute there involved had uniformly barred the issuance of licenses to all uninsured motorists rather than presuming fault only as to uninsured motorists, no Fourteenth Amendment issue would have been presented).*

* For a review of the provisions involved, see pp. 35-38, *ante*.

Section 352.30(d) does not depend on any irrebutable presumption. As noted, the basis for the classification, qualified recipient status, is taken directly from the unchallenged, underlying legislation and it is uniformly applied to all recipients with non-paying lodgers. When shelter is shared between recipients and non-recipient non-paying lodgers, pro-ration under § 352.30(d) insures that the shelter needs of the recipients, the only individuals the statutes place in the aided class, receive shelter allowances in direct proportion to their needs, while excluding the non-recipient, non-paying lodger, an individual not within the aided class.

The pro-ration formula recognizes that the beneficial use of a dwelling is properly allocated among the number of individuals actually using it and that the cost of the entire dwelling (or the allowed rent) is similarly properly allocated in the same number of individual shares. See discussion pp. 38-39, *ante*. Thus when an individual (whether recipient or non-recipient) is added to the dwelling the number of shares increases and the cost per share decreases (as when an individual is subtracted, the number of shares decreases and the cost per share increases). If the individual that is added is a non-recipient his share has proportionately decreased the other shares notwithstanding that his own share is not compensated with public funds or otherwise "paid". This result achieves a perfect congruence with the terms of the relevant statutes and the actual needs of the recipients, i.e. the recipients are compensated for their shares and the non-paying lodger is not compensated for his. Thus, in stating that the "lodger's

* The definition of the non-paying lodger as one who pays less than $15 per month is also reasonable and necessarily uniform. See p. 48, *ante*.

presence . . . in fact diminishes the [recipient] family's shelter needs" (A. 653) so that the "family needs less money to pay its own, *pro rata,* share of the rent" (A. 651), the district court majority stated what in fact occurs when an individual is added to the dwelling, not an "irrebuttable presumption" contrary to fact. Equally, if an individual were subtracted from the dwelling, the number of shares would decrease, and the remaining individuals would need "more money" to pay their own pro-rata shares (regardless of whether they were recipients or non-recipients). If the remaining individuals were recipients, and the individual who left was a non-recipient, the amount of recipients' shares would increase although the "lost" share had not been "paid" when it was held by the non-recipient. New York recognizes both realities and adjusts recipients' shelter allowances both downward and upward as the occasion requires. See illustrations at pp. 39-41 *ante.*

To accept the district court majority view that pro-ration under § 352.30(d) depends on an "irrebuttable presumption" requires the adoption of certain other "irrebuttable presumptions" which are inconsistent with reality and the sound administration of the public assistance program. First, the district court's view rests on the assumption that shelter needs and thus shelter shares were fixed on the date the recipients' needs were first budgeted. This the assumption permits the court to find that if a "lodger" is added after that date, the shelter allowances of the recipients are not necessarily decreased by the amount allocable to that share. Equally, if the lodger had been with the recipients on the date the budget was first established and he thereafter left, the district court would be compelled to find that the recipients' shares had not increased by the amount previously allocable to the lodger's share. Thus the recipients who would now occupy the entire dwelling would continue to receive less than an allowed rent. Second, the refusal to accept the separate assessment of the shelter needs of recipients and non-

recipient lodgers requires that the grant of shelter allowances turn on the question of who got to the dwelling "first," the recipients or the non-recipient "lodger". In the former instance, the recipients would receive a shelter allowance for the entire dwelling because their shelter needs allegedly do not change because of the addition of the lodger and cannot be separated from those of the lodger (as urged by appellees herein). In the latter instance, the recipients would receive no shelter allowance because the non-recipient's shelter needs would not change because of the addition of the recipients and could not be separated from those of the recipients. Compare 18 N.Y.C.R.R. § 352.3(c) (Ex. "2" p. 15a) providing *inter alia* for prorated shelter allowances when recipients reside "in the home of" a non-responsible relative or friend who is not a recipient of assistance. Third, if recipients are entitled to shelter allowances to meet only their own needs but those needs are deemed to be co-extensive with the allowed rent for the entire dwelling only because the lodger has failed to pay his share, the non-paying lodger is thereby presumed to have no shelter need at all, or, if he has a shelter need, it must have remained unmet since the reciients satisfied only their own needs.

As these "irrebuttable presumptions" illustrate, both the recipients and the lodgers have seperate shelter needs which may be assessed in proportion to their participation in the shared dwelling. That in any given case a lodger's shelter need is unmet either because of his refusal to pay or his refusal to qualify for assistance does not transfer the lodger's need to the recipients. To the exent that the district court majority would require the recipients to meet the entire cost if the lodger lives "with them" (and necessarily require that the lodger meet the entire cost if the recipients live "with him"), it is requiring recipients and lodgers to meet each other's needs and not their own.

The only "true" due process issue presented by § 352.30 (d) is whether a recipient has an opportunity to contest

his assignment to the class of recipients who share shelter with non-paying lodgers, i.e. does he in fact share shelter with a non-paying lodger. *Richardson* v. *Belcher,* 404 U.S. 78, 80-81 (1971). This opportunity is provided to every recipient in New York. The local social services districts investigate every case where shelter is believed to be shared with a lodger prior to taking any administrative action. The recipient is then advised of the proposed action, if any, and if adversely affected, obtains the right to a state fair hearing. Social Services Law §§ 135-a, 135; 18 N.Y.C.R.R. Part 358. *Goldberg* v. *Kelly,* 397 U.S. 254 (1970). During these proceedings, the recipient is provided with notice or opportunity to be heard on the determinative issues. Those issues are whether a non-responsible individual has been added to the dwelling who is a non-recipient (i.e. a lodger); whether he has failed to pay at least $15 per month (i.e. a "non-paying" lodger);* the number of recipients and such lodgers; and the amount of the allowed rent. Once these issues are resolved in the agency's favor, the recipient has been shown to possess those characteristics which in fact distinguish him from recipients entitled to the allowed rent, i.e. he now shares shelter with a person who is not entitled to have his shelter need met with public funds, and the recipient's own shelter need has been assessed in light of the change in circumstances and in terms of his participation in the dwelling and allowance provided accordingly.

No further inquiry is required, and no further inquiry could change the result to require payment of the lodger's share with public assistance funds. The point was illus-

* The distinction between "non-paying" and "contributing" determines how the lodger's share of shelter cost will be apportioned, not whether another share has been added. The "non-paying" lodger's share is a fraction of the allowed rent. The "contributing" lodger's payments above the exempt amount are offset against the standard of need and result in a reduction of the amount of assistance previously paid. See Point II, subpoints B and C.

trated at the evidentiary hearing held before the district court. Notwithstanding Mrs. D'Alessio's testimony about her relationship with her non-paying lodger (A. 268-294), the fact remained at the conclusion of the hearing that H.M. had not qualified for assistance, was therefore not entitled to have his shelter need met with public funds, and, indeed, "want[ed] nothing to do with public assistance" (A. 287).

The evidentiary hearing below illustrated in addition that the more far ranging inquiry which the district court believed would "cure" the alleged "irrebuttable presumption" of § 352.30(d) must involve the local agencies in assessing the psychological and social attributes of "lodgers" to determine whether they are "good" or "bad" for the recipients with whom they live. These matters would be considered notwithstanding the fact that the lodger had not sought public aid, and, as in the case of H.M., might refuse to appear before the agency, and notwithstanding the fact that even if the lodger were determined to be "good," he would still not be a person within the aided class until and unless he qualified under the standard of need. Dr. Gans' testimony on appellees' behalf is illustrative: He stated that the poor often live in extended families and with friends; that many of these relatives and friends could be classified as lodgers (A. 298, 299-303);* and that at least some of these relationships were "fragile" (A. 314).

It does not appear how the value of these "fragile" relationships could be assessed by a local social services agency under any kind of uniform standards; how these relationships would be protected by an investigation of their value by a public agency; or even how they could be assessed without the direct and voluntary participation of

* He did not know what percentage were "non-paying" lodgers or of any studies on that point (A. 308).

the lodger. Judge Weinstein's suggestion that the state fair hearing determine, *inter alia,* whether the lodger "helps hold the family unit together" encounters the same difficulties (A. 642).

The hearing below further illustrated that § 352.30(d) does not contribute to housing problems encountered by welfare families. Mr. Davidoff's testimony on appellees' behalf is illustrative: He stated that there was a low vacancy rate that particularly affected poor families (A. 319, 321-322) but conceded that the vacancy rate was immaterial to the allocation of an established rent among a given number of people (A. 331); he stated that overcrowding was a serious problem for low income families in New York State (A. 323) but could not express an opinion, without further study, as to the effect of a regulation which reduced the shelter allowances of recipients every time a non-paying lodger was added to the dwelling (A. 332); he stated further that some of the housing occupied by welfare recipients in lower Westchester County was "substandard" (A. 325) but could not state how the addition of a non-paying lodger made a given apartment more or less substandard (A. 333). Mr. Davidoff also acknowledged that while four recipients occupied an entire dwelling unit, the use of that unit was properly allowable only to them, but that when a fifth person, the lodger, moved in, circumstances changed and the use of the dwelling was allocable to five, rather than four, persons (A. 337-338). He would have left the choice of how the cost of shelter was to be shared, if at all, to the four recipients and the lodger (A. 338).

It is apparent from the illustrations provided that the further inquiry required by the district court majority would not make § 352.30(d) "constitutional" but would in fact extend the scope of the existing federal and state programs and require administrators, and ultimately courts, to make judgments of social policy which are within the legislative pre-rogative. *Jefferson* v. *Hackney,* 406 U.S. at 551; *Dandridge* v. *Williams,* 397 U.S. at 487.

This Court has previously recognized that the "irrebuttable presumption" doctrine must be applied with "extreme care" to avoid just such unwarranted interference with the legislative power. *Cleveland Board of Education* v. *La Fleur,* 414 U.S. 632, 39 L. Ed. 2d 52, 66-70 (1974) (POWELL, J. concurring in result) and 70-72 (REHNQUIST, J. dissenting); *Vlandis* v. *Kline,* 412 U.S. 441, 459-463 (1973) (BURGER, Ch. J. dissenting) and 463-469 (REHNQUIST, J. dissenting); *Stanley* v. *Illinois,* 405 U.S. 645, 662 (1972) (BURGER, Ch. J. dissenting).

The Court's prior applications of the "irrebuttable presumption" doctrine are not opposed. In no case has the doctrine been applied to a classification which included or excluded individuals in perfect congruity with a legitimate legislative purpose. In no case has the doctrine been applied when the individual affected by the classification was provided with an opportunity to contest his inclusion or exclusion from the class or where even a potentially affected individual can conveniently adjust his status as herein the non-paying lodger may become either a contributing lodger or a recipient. Compare *Cleveland Board of Education* v. *La Fleur, supra* (pregnant teachers presumed physically unfit to teach after further fifth month of pregnancy); *Vlandis* v. *Kline, supra* (entering non-resident student presumed incapable of becoming *bona fide* resident during entire course of studies); *Stanley* v. *Illinois, supra* (unwed father presumed unfit to have custody of natural children); *United States Department of Agriculture* v. *Murry,* 413 U.S. 508 (1973) (entire household presumed ineligible for food stamps from alleged lack of need of one member); *Bell* v. *Burson, supra* (uninsured motorist presumed at fault if involved in accident); *Carrington* v. *Rash,* 308 U.S. 89 (1965) (servicemen presumed incapable of establishing *bona fide* residence if non-resident prior to entry into service); *Heiner* v. *Donnan, supra* (gifts made within 2 years of death of donor

presumed to be made in contemplation of death); *Schlesinger* v. *Wisconsin, supra* (1926) (gifts made within 6 years of death of donor).

The non-paying lodger is not "presumed" to be a non-recipient, he is in fact so until he demonstrates his eligibility. As shown, the interests which support the regulation in this regard are co-extensive with the federal and state interests involved in the public assistance program. The class of recipients with non-paying lodgers is not overinclusive since, by definition, it includes no recipient whose lodger is in fact a recipient and thus neither the recipient nor the lodger is wrongly denied his entitlement. Compare *Cleveland Board of Education* v. *La Fleur,* 32 L.Ed 2d at 63-64; *Vlandis* v. *Kline,* 412 U.S. at 446-448. Neither is it underinclusive since the presence of the non-recipient lodger does not impute non-recipient status to persons who are in fact recipients. Compare *United States Department of Agriculture* v. *Murry,* 413 U.S. at 513-514.

A pro-ration method which distinguishes and compensates the shelter needs of recipients at 100% of their *per capita* standard of need and excludes the need of the non-paying lodger is in fact a "rational measure" for achieving the interests which in turn define the classification. *United States Department of Agriculture* v. *Murry,* 413 U.S. at 511-514. The facts of each case are investigated, and every recipient may have a full hearing to contest his inclusion in the class.

Even if § 352.30(d) is viewed as creating an "irrebuttable presumption," that presumption rests on the "necessarily" and "universally true . . . fact[s]" that the recipients have taken in a non-paying lodger who now shares the dwelling and is not himself a recipient. *Cleveland Board of Education* v. *La Fleur,* 33 L. Ed. 2 at 63, quoting *Vlandis* v. *Kline,* 412 U.S. at 452. See HAYS, C.J. dissenting in the district court, A. 657-660. Nothing further is required to sustain an irrebuttable presumption as valid.

Insofar as the district court majority would require the shelter needs of some non-paying lodgers to be met with public funds on the basis of facts determined at the expanded "hearing," it amends the existing legislation to add the unqualified, non-paying lodger to the aided class in order to obtain what it apparently believes to be more a desirable social result. In so doing it revives long abandoned notions of substantive due process. *Dandridge* v. *Williams,* 397 U.S. at 484-485; *Ferguson* v. *Skrupa,* 372 U.S. 763 (1963).

POINT IV

The District Court erred in refusing to allow evidence of substantial contributions of household furnishings made to appellee Hurley by her lodger prior to the events giving rise to the action and in striking conforming allegations and documentation from appellants' answer.

After remand, a hearing was held upon the suggestion of Judge Weinstein. At the hearing, appellants, having previously pleaded that the Hurleys' non-paying lodger had made extensive contributions to their shared dwelling (A. 218-219), attempted to adduce proof in this regard (A. 356-359). The court, upon plaintiffs' objection ruled the evidence inadmissible and later struck the conforming part of the answer (A. 632-633). In so ruling, the district court committed prejudicial error, warranting a vacatur of the judgment and remand. See Rule 61, F.R. Civ. P.*

While the district court did not articulate its reasons for its ruling on the evidentiary objection and its consequent striking of the answer regarding the furniture contributions of the Hurleys' lodger,** appellees, both below (A. 358-359, 625-627) and in this Court (Appellees' motion to affirm, pp. 11-13) urge two bases for exclusion: lack of relevance, and the alleged pendency of appellants' motion for

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* Cf. Rule 103(a) of the new Federal Rules of Evidence. (Effective July 1, 1975)

** The allegations stricken, would have shown that Hurleys had received wall-to-wall carpeting throughout the apartment, an upholstered sofa, armchairs and draperies, a complete bedroom suite, a color television, and a dinette set, from the individual who became their non-paying lodger. Furniture, obtained from a public assistance furniture grant had been "stored . . . in the basement" (A. 218, 222-223, 224).

summary judgment. Neither of these furnished an adequate basis for the action of the court.

There can be only two types of lodgers, those with the financial capacity to pay their share of shelter and those without such capacity. Opinion of Hays, C.J. in the district court (A. 658). With respect to the former category, § 352.30(d) properly prevents the diversion of limited public assistance funds for the benefit of the lodgers who prefer to expend their income on other "needs". With respect to the latter, the state provides adequate procedures whereby a needy individual can apply for and receive public assistance directly, rather than by the diversion of benefits provided for recipients. The evidence offered to the district court would have shown that ADR was a financially capable lodger who in effect chose to devote substantial resources to the Hurleys' comfort while also choosing to charge his share of the rent against public funds (A. 359).

Appellees' objection on the grounds of relevance was principally concerned with the fact that the gifts alleged were not made during the period that the local agency and the state fair hearing established that ADR was a non-paying lodger, i.e. from November, 1970 through February, 1971 (A. 357-8). While this is true, it does not undercut the relevance of the gifts. The evidence offered would have established that the gifts were made at a time very close to November, 1970, i.e. probably after April, 1969 and before September 15, 1970 (A. 222). There is no dispute as to the fact that ADR was employed prior to the time he became a non-paying lodger, and no change in his employment status was alleged for the period he lived with the Hurleys. These facts would have led the district court to conclude that ADR had the financial capacity to pay his *pro rata* share of the rent during the period that he was a lodger, and consequently, a failure to pro-rate would operate to condone the diversion of public assistance to those

not eligible; an evil § 352.30 was intended to avoid (A. 156).*

Contrary to the allegations made by appellees, appellants did not have a motion for summary judgment pending before the three-judge court. The only summary judgment motions by appellants were made on the statutory "pendent" claims before the single district judges in *Hurley* and *Taylor*, not on the constitutional claims. These motions were granted on the Second Circuit appeal (A. 170). On remand to the three-judge court, appellants answered and did not move (A. 215 *et seq.*). Thus, the only motion properly before the district court was appellees' motion for summary judgment, not that of appellants.

While appellants agree that the gravaman of the statutory and the constitutional claims was the same and thus that the actions could have been disposed of by the three-judge court without further fact finding, an evidentiary hearing was held at the instance of the appellees pursuant to Judge Weinstein's suggestion notwithstanding their own pending motion for summary judgment. The subject matter of hearing was housing conditions and "living arrangements" among the poor. In this context appellants sought to offer additional facts concerning appellee Hurley's "living arrangements" in relation to the operation of the § 352.30(d). Since those facts were relevant to purpose of the regulation, the new issues tendered by appellees and non-cumulative, they should have been admitted.

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* Relevant evidence, is defined by Rule 401 Federal Rules of Evidence as that having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The Advisory Committee's notes points out that evidence that is background or tends put a problem in context is admissible. 46 F.R.D. 161, 222 (1969).

The standard on appeal is one of harmless error, a standard that is characterized by its result orientation. *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118 (1939). In this case, while we are necessarily left to speculate as to the effect of the offer of proof on the result; the evidence was both germane to the issues before the court, and not otherwise inadmissible. It cannot be said that the court's ruling did not effect the outcome of the action and that it was not prejudicial error.

Motions to strike redundant, immaterial, impertinent or scandalous matter under F.R. Civ. P. 12(f) are not favored, *Thompson* v. *United Artist Theatre Circuit, Inc.*, 43 F.R.D. 197 (S.D.N.Y. 1967), and should be denied unless the allegations have no possible relation to the controversy, *Augustus* v. *Board of Public Instruction of Escambia County, Florida*, 306 F. 2d 862 (5th Cir. 1962), and cause prejudice to one of the parties. *King* v. *Georgia Power Company*, 295 F. Supp. 943 (N.D. Ga. 1968). Even where the allegations come within the literal meaning of the terms of the Rule 12(f), a motion to strike should be denied except upon a showing of unfair prejudice to the moving party. *Budget Dress Corp.* v. *International Ladies' Garment Worker's Union, AFL-CIO*, 25 F.R.D. 506, 508 (S.D.N.Y. 1959); *Mil-Hall Textile Co.* v. *Dun & Bradstreet, Inc.*, 160 F. Supp. 778, 780 (S.D.N.Y. 1958); *Kinnear-Weed Corp.* v. *Humble Oil Refining Co.*, 214 F. 2d 891 (5th Cir. 1954).

Appellants did not claim any prejudice and merely asserted that the allegations were irrelevant. As has previously been shown such is not the case. The court therefore, committed reversible error. See *South Side Drive-In Co.* v. *Warner Bros.*, 30 F.R.D. 32 (E.D. Pa. 1962); *Irving Berlin, Inc.* v. *Anziano*, 4 F.R.D. 33 (S.D.N.Y. 1944).

POINT V

The District Court erred in refusing to dismiss the claims of appellees Taylor and Otey as moot notwithstanding that neither appellee continued to have a live grievance against the operation of § 352.30(d).

Pursuant to the direction of the United States Court of Appeals for the Second Circuit (A. 164, n.3), the issue whether certain of named plaintiffs presented a justiciable controversy was argued before the statutory three-judge court.* The court declined to rule on the issue as being unnecessary in light of the class action nature of the complaint.

In so doing, the court relied principally on *Richardson* v. *Ramirez*, 418 U.S. 24 (1974). However, the rationale in *Richardson, supra* is inapposite to the instant case. *Richardson* was brought to the Supreme Court through the California state courts. As such, the class action determination and the propriety of plaintiffs there being representatives of the class even though the action was moot as to them, were matters of California not federal procedure, and hence not reviewable by the Supreme Court under federal standards.** 418 U.S. at 39.

In contrast, plaintiffs Otey and Taylor commenced the action in the United States District Court for the Eastern

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* At the time that the statutory issue was decided in the Circuit the Taylors' grants had been restored because the non-paying lodger began to receive aid under the existing Aid to Disabled Program. Subsequent to the Circuit Court's decision the Oteys' (the other putative class representative in the Eastern District action) grants had been restored because their non-paying lodger, an adult son, had established independent eligibility and thereafter established a separate household.

** As the controversy was not moot as to the entire class, a justiciable controversy continued to exist between the real parties in interest. Consequently, the Court still had jurisdiction. Compare *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974).

District of New York; and thus subject to both the case and controversy requirement of Article III, and the requirement that a class may only be represented in that court by a class member. It is significant to note that in writing for the court in *Richardson*, Justice Rehnquist pointed out (418 U.S. at 39):

> "... if this action had arisen in the federal courts there would be serious doubt as to whether it could have proceeded as a class action on behalf of a class of ex-felons denied the right to register after the three named plaintiffs had been granted that right."

See *Bailey* v. *Patterson*, 369 U.S. 31, 32-33 (1962); *Indiana Employment Security Div.* v. *Burney*, 409 U.S. 540 (1973); *O'Shea* v. *Littleton*, 414 U.S. 488, 494-5 (1974).

In the instant case the claims of appellees Taylor and Otey had become moot, not through a voluntary cessation of activity on the part of defendants, but rather because of plaintiffs' voluntary change of circumstances taking them outside the scope of the regulation. Nor are the subsisting federal questions ones that fall within those cases where the act is capable of repetition yet evading review.* See *DeFunis* v. *Odegaard, supra.***

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* For this reason, *Sosna* v. *Iowa*, —— U.S. ——, 43 U.S.L.W. 4125 (1/14/75), which challenged the constitutionality of a one year residency requirement for the commencement of a divorce proceeding in the Iowa courts, is distinguishable *Id.* n. 9 at 4128.

** It is not contended that because of the Oteys' and Taylors' change in circumstances, the entire action must abate. Rather, it is urged that these named plaintiffs must be dropped as no longer being members of the class they purport to represent, and there is nothing left, as to them, to adjudicate, for they can no longer show that they are being injured by the operation of the regulations, nor is there any relief that the federal judicial power can grant to these plaintiffs *Edelman* v. *Jordan*, 415 U.S. 651 (1974); *Rothstein* v. *Wyman*, 467 F. 2d 226 (2d Cir. 1972), cert. den., 411 U.S. 921 (1973).

The error in permitting Taylor and Otey to continue to remain in the case is that it allows the court to proceed on either hypothetical or stale facts to decide questions of law. In such instance, the court itself must become the advocate for the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions" is absent. *Baker* v. *Carr,* 369 U.S. 186, 204 (1962); *O'Shea* v. *Littleton,* 414 U.S. 488 (1974). Cf. *Golden* v. *Zwickler,* 394 U.S. 103, 190-110 (1969); *Massachusetts* v. *Mellon,* 262 U.S. 447 (1923).

POINT VI

The District Court erred in defining the appellee class to include recipients who share shelter with contributing lodgers and with non-paying lodgers and in invalidating both provisions of § 352.30(d) when those provisions are severable and no named appellee shared shelter with a contributing lodger.

The judgment and order of the District Court strike the entire of section 352.30(d) on the grounds of deprivation of due process (A. 661 *et seq.*) even though the section is severable. The regulation treats amounts actually contributed by the lodger (over $15) or boarding lodger (over $60) as income to the assistance group in accordance with the provisions of 42 U.S.C. § 602(a)(7). The only part of the regulation properly in issue, legislates for the instance where the lodger pays less than $15 per month.

It is of no significance that the contributing lodger provision is contained within the same section as that of the non-paying lodger. The settled principle of severability requires that only the bad be stricken, and the remainder be left to stand. As this Court wrote in *Dorchy* v. *Kansas,* 264 U.S. 286, 289-90 (1924): "Provisions within the legislative power may stand if separable form the bad. . . . But provisions inherently objectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act should fall." *Gatewood* v. *North Carolina,* 203 U.S. 531, 543 (1906); *Guinn* v. *United States,* 238 U.S. 347, 366 (1915); *Schneider Granite Co.* v. *Gast Realty Co.,* 245 U.S. 288, 290 (1917); *Baird* v. *Davoren,* 346 F. Supp. 515, 522 (D. Mass. 1972). *Harrison* v. *NAACP,* 360 U.S. 167 (1959); *United States* v. *Jackson,* 390 U.S. 570 (1968). An excellent

example is found in *Connell* v. *Higgen-bottom,* 403 U.S. 207 (1971), where the court enjoined part of an oath as unconstitutional, leaving the remainder to stand.

None of the named appellees shared her dwelling with a contributing lodger and thus no named plaintiff had standing to complain of the income offset. The District Court order in failing to observe this distinction, committed to two errors require partial vacatur Judgment and Order.

First, the court erred in defining the class to include both non-paying and contributing lodgers,* in violation of the requirement of Rule 23(a)(4), F.R. Civ. P. —— that is— that the representatives of the class be, in fact, members of the class. *O'Shea* v. *Littleton,* 414 U.S. 488, 495 (1974); *Indiana Employment Division* v. *Burney,* 409 U.S. 540 (1973); *Bailey* v. *Patterson,* 369 U.S. 31, 32-3 (1962). Recipients with non-recipient lodgers are divided into two distinct classes: those with lodgers who contribute $15 or more to the household, and those who don't. In this light, a class represented only by recipients with a non-paying lodger cannot represent a class of recipients with contributing lodgers.

Proceeding from the foregoing premise plaintiffs present no justiciable controversy with respect to the contributing lodger portion of the regulation, and therefore the district court could not obtain jurisdiction to enjoin its enforcement. In *O'Shea* v. *Littleton, supra* 414 U.S. at 493-4, the court wrote:

> "The complaint failed to satisfy the threshold requirement imposed by Art. III of the Constitution that those who seek to invoke the power of the federal

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* In the proceeding before Judge Bauman on the statutory issue, the class was defined the same way (A. 95-96). Subsequently, the Court issued an amended order defining the class to include only those who had their grants reduced, terminated, suspended or denied solely because of the presence of a *non-contributing* lodger (A. 99).

> courts must allege an actual case or controversy. *Flast* v. *Cohen,* 392 U.S. 83, 94-101 (1968); *Jenkins* v. *McKeithen,* 395 U.S. 411, 421-425 (1969) (opinion of Marshall, J.) Plaintiffs in the federal courts must allege some threatened or actual injury before a federal court may assume jurisdiction. *Linda R.S.* v. *Richard D.,* 410 U.S. 614, 617 (1973). There must be a 'personal stake in the outcome' such as to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional question'. *Baker* v. *Carr,* 369 U.S. 186, 204 (1962). Nor is the principle different where statutory issues are raised. Cf. *United States* v. *SCRAP,* 412 U.S. 669, 687 (1973). Abstract injury is not enough. It must be alleged that plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as a result of the challenged statute or official conduct. *Massachusetts* v. *Mellon,* 262 U.S. 447, 488 (1923).

Moreover, the requirement that income to the assistance group actually received from a contributing lodger be considered in determining the amount of assistance is valid. 42 U.S.C. § 602(a)(7) and Social Services Law § 131-a, subd. 1; *King* v. *Smith,* 392 U.S. 309 (1970). (See Point II, *ante* pp. 50-51).

Thus, in enjoining the enforcement of 18 N.Y.C.R.R. § 352.30(d), in its entirety, the District Court enjoined a severable portion of the regulation, never in issue, by its own terms clearly proper and at the instance of those who failed to either allege or demonstrate that the enforcement of that regulation in any way injured them. Such action was improper and warrants a partial reversal and vacatur of the Judgment and Order.

CONCLUSION

The judgment and order of the District Court in No. 74—543 should be reversed and the decision of the Second Circuit in No. 74—5054 should be affirmed. Alternatively, the judgment and order of the District Court in No. 74—453 should be vacated and the cause remanded to the District Court for further proceedings.

Dated New York, N.Y., February 20, 1974.

Respectfully submitted,

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Exhibit "1".

18 N.Y.C.R.R. § 352.30. Persons included in the budget.

(a) For budgetary purposes the agency shall include in its estimate of need and application of income all persons applying for or receiving public assistance and care and living as a unit within the same household. Members of the family temporarily absent from the home shall be included as a member of the household in the budgetary estimate, such as children or minors attending school away from home, except when maintenance is provided without cost.

(b) For purposes of the schedule of monthly grants and allowances (Schedule SA-2 of section 352.2 of this Part) only, the household of a pregnant woman shall be deemed increased by one person from the fourth month of medically verified pregnancy.

(c) When an applicant or recipient willfully fails or refuses to comply with the requirements of Part 385 of this Title the needs of the family shall be determined as if he were a member of the family, however, the grant shall be provided on a pro-rata basis for the eligible family members only.

(d) A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance.

Exhibit "1".

§ 352.31. Estimate of need and application of income.

(a) *For applicant or recipient.*

(1) The estimate of need for any applicant or recipient shall include all items of need as specified in these regulations for persons in the circumstances under which such items are allowed. The amount to be included for each item of need shall be the appropriate amount provided in accordance with the schedules and other provisions of these regulations. To the extent that an item offered is otherwise provided it shall not be included in the estimate of need, but the manner in which such item is provided shall be recorded.

(2) All available and unrestricted income of an applicant or recipient and of the spouse, if in the home, including support payments required to be made by a parent pursuant to an order of the family court or other appropriate court, shall be protrated and applied against the needs of the applicant, the spouse and the minor children of either or both. The income of a legally responsible relative in the home who has been disqualified under Part 385 of this Title shall be applied in determining eligibility and degree of need for himself as if he were a member of the family, and the family members for whom he is responsible. The amount of the grant for the eligible family members shall be provided on a pro-rata basis in accordance with section 352.30(c). Under exceptional circumstances other than disqualification under Part 385, a spouse who refuses to make application for assistance and to have his income so applied against the needs of his family, shall have his needs estimated as if he were applying for public assistance and his income applied first against his own needs and any surplus against the needs of his dependents.

Exhibit "1".

(3) When an applicant or recipient is living, other than on an occasional or transient basis, with a person to whom such applicant or recipient is not married, the available income and resources of such person shall be applied in accordance with the following:

(i) When the person is willing his or her available income and resources shall be applied in determining eligibility and degree of need.

(ii) When the person is willing to assume responsibility only for his or her own needs, the needs of the applicant or recipient, and those children for whom such person is legally responsible, the available income or resources of such person shall be applied in determining eligibility and degree of need of those persons only; and assistance for any remaining children shall be provided on a pro rata basis.

(iii) When the person is willing to assume responsibility only for his or her needs, and the needs of those children for whom such person is legally responsible, the available income and resources of such person shall be applied in determining eligibility and degree of need of those persons only; and assistance for the applicant or recipient and remaining children shall be provided on a pro rata basis.

(iv) When the person is unwilling to assume responsibility for the applicant or recipient or his or her children and there are no children for whom such person is legally responsible, such person shall be treated as a lodger in accordance with subdivision (d) of section 352.30 of this Part.

Exhibit "1".

(v) The foregoing shall not affect the responsibility of such person to provide support for children for whom such person is legally responsible, nor shall it relieve the social services official from his responsibility to initiate appropriate support proceedings.

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Exhibit "2".

RELATED STATUTES AND REGULATIONS

Federal Statutes

42 U.S.C.

§ 601. *Authorization of Appropriations*

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents to attain or retain capability for maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out this part. The sums made available under this section shall be used for making payments to states which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

§ 602. *State plans for aid and services to needy families with children; contents; approval by Secretary*

(a) A State plan for aid and services to needy families with children must

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(7) . . . provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be

Exhibit "2".

considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income;

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(10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals;

§ 606. *Definitions*

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, cousin, nephew or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment.

(b) The term "aid to families with dependent children" means money payments with respect to, or . . . medical care in behalf of or any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care

Exhibit "2".

recognized under State law to meet the needs of the relative with whom any dependent child is living (and the spouse of such relative if living with him and if such relative is the child's parent and the child is a dependent child by reason of the physical or mental incapacity of a parent or is a dependent child under section 607 of this title), and (2) payments with respect to any dependent child (including payments to meet the needs of the relative, and the relative's spouse, with whom such child is living, and the needs of any other individual living in the same home if such needs are taken into account in making the determination under section 602(a)(7) of this title) which do not meet the preceding requirements of this subsection, but which would meet such requirements except that such payments are made to another individual who (as determined in accordance with standards prescribed by the Secretary) is interested in or concerned with the welfare of such child or relative, or are made on behalf of such child or relative directly to a person furnishing food, living accommodations, or other goods, services, or items to or for such child, relative, or other individual, but only with respect to a State whose State plan approved under section 602 of this title includes provision for—[Subdivision continues describing conditions under which protective payments are authorized.]

• • •

(c) The term "relative with whom any dependent child is living" means the individual who is one of the relatives specified in subsection (a) of this section and with whom such child is living (within the meaning of such subsection) in a place of residence maintained by such individual (himself or together with any one or more of the other relatives so specified) as his (or their) own home.

Exhibit "2".

FEDERAL REGULATIONS

45 C.F.R.[•]

§ 233.20. *Need and amount of assistance*

(a) *Requirements for State Plans*

A State Plan for . . . AFDC . . . must, as specified below: (1) *General.* Provide that the determination of need and the amount of assistance for all applicants and recipients will be made on an objective and equitable basis and all types of income will be taken into consideration in the same way except where otherwise specifically authorized by Federal statute.

• • •

§ 233.90 *Factors specific to AFDC*

(a) *State plan requirement*

A State plan under Title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extend [sic] that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis

[•] October 1, 1973 rev. ed.

Exhibit "2".

for a finding of ineligibility or for assuming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only if the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

STATE STATUTES

Social Services Law

§ 131. *Assistance, care and services to be given*

1. It shall be the duty of the Social Services officials, insofar as funds are available for that purpose, to provide adequately for those unable to maintain themselves in accordance with the requirements of this Article [5—Assistance and Care] and other provisions of this chapter [55 of the Consolidated Laws of New York State]. They shall, whenever possible, administer such care, treatment and service as may restore such persons to a condition of self-support or self-care, and shall further give such service to those liable to become destitute as may prevent the necessity of their becoming public charges.

• • •

3. As far as possible families shall be kept together, they shall not be separated for reasons of poverty alone and they shall be provided with services to help maintain and strengthen family life. • • •

• • •

4. For needy persons who are members of a family household, the standard of need for their determining

Exhibit "2".

eligibility for public assistance shall be as prescribed by section one hundred and thirty-one-a of this chapter and applicable federal requirements • • •.

• • •

§ 131-a *Monthly grants and allowances of public assistance*

1. Any inconsistent provision of this chapter or other law notwithstanding, social services officials shall, in accordance with the provisions of this section and regulations of the department, provide home relief, veteran assistance, old age assistance, assitance to blind, aid to the disabled and aid to dependent children, to needy persons who constitute or are members of a family household, who are determined to be eligible in accordance with standards of need established in subdivision two. Provision for such persons, for all items of need, less any available income or resources which are not required to be disregarded by other provisions of this chapter, shall be made in accordance with this section. Such provision shall be made in monthly or semi-monthly allowances and grants within the limits of the schedules included in subdivision three of this section except for additional amounts which shall be included therein for shelter, fuel for heating, additional cost of meals for persons who are unable to prepare meals at home and for other items for which specific provision is otherwise made in article five. As used in this section the term "shelter" may include a grant not to exceed seven hundred and fifty dollars toward the purchase of an interest in a co-operative • • •.

2. The following schedule shall be standard of monthly need for determining eligibility for all categories of assistance in and by all social services districts:

Exhibit "2".

Number of Persons in Household[•]

One	Two	Three	Four	Five	Six
$94	$150	$200	$258	$318	$368

For each additional needy person in the household there shall be added an additional amount of fifty dollars monthly.

In addition to the above, the standard of need shall include amounts for shelter and fuel for heating, amounts for additional costs and meals for persons who are unable to prepare meals at home and amounts for other items when required by individual case circumstances for which specific provision is otherwise made in article five of this chapter.

3. Persons and families determined to be eligible by the application of the standard of need prescribed by the provisions of subdivision two less any available income or resources which are not required to be disregarded by other provisions of this chapter, shall receive maximum monthly grants and allowances in all social services districts in accordance with the following schedule, for home relief (including veteran assistance) and aid to dependent children:

Number of Persons in Household[•]

One	Two	Three	Four	Five	Six
$94	$150	$200	$258	$318	$368

[•] Effective July 1, 1974.

The standard of need and the amount of assistance under the prior schedules were: One—$84; Two—$150; Three—$179; Four—$258; Five—$318 and Six—$329 plus $45 for each additional person.

Exhibit "2".

For each additional eligible needy person in the household there shall be an additional allowance of fifty dollars monthly.

§ 145. *Penalties*

1. Any person who by means of a false statement or representation, or by deliberate concealment of any material fact, or by impersonation or other fradulent device, obtains or attempts to obtain, or aids or abets any person to obtain public assistance or care to which he is not entitled, or does any wilful act designed to interfere with the proper administration of public assistance and care, shall be guilty of a misdemeanor, unless such act constitutes a violation of a provision of the penal law of the state of New York, in which case he shall be punished in accordance with the penalties fixed by such law. Failure on the part of a person receiving public assistance or care to notify the social services official granting such assistance or care of the receipt of money or property or income from employment or any other source whatsoever, shall, upon the cashing of a public assistance check by or on behalf of such person after the receipt of such money, or property, or income, constitute presumptive evidence of deliberate concealment of a material fact. Whenever a social services official has reason to believe that any person has violated any provision of this section, he shall promptly refer the facts and evidence available to him to the appropriate district attorney or other prosecuting official, who shall immediately evaluate the facts and evidence and take appropriate action.

2. The provisions of subdivision one of this section shall apply to social services officials and employees,

Exhibit "2".

who shall also be subject to removal and shall be liable in an action brought by the county or city, or by the state commissioner of social services, for the value of the public assistance improperly granted to any person as a result of the wilful wrongful act of such official or employee.

• • •

§ 343. *Declaration of Object* [*of Aid to Dependent Children Program*]

It is hereby declared a state policy that aid to dependent children be provided under the provisions of this title in every county of the state.

§ 344. *Responsibility*

1. Each public welfare district shall be responsible for providing aid to dependent children, under this title, to persons eligible therefor who reside in its territory • • •.

§ 349. *Eligibility*

A. Aid to dependent children shall be given to a parent or other relative as herein specified for the benefit of a child or minor under eighteen years of age, or of a minor under twenty-one years of age who is a student regularly attending high school in pursuance of a course of study leading to a high school diploma or its equivalent, or is regularly attending a course of vocational or technical training designed to fit him for gainful employment or of a college or university whose curriculum is approved by the state department of education • • •

Exhibit "2".

§ 350. *Character and Adequacy*

1. (a) Allowances shall be adequate to enable the father, mother or other relative to bring up the child properly, having regard for the physical, mental and moral well-being of such child, in accordance with the provisions of section one hundred thirty-one-a of this chapter and other applicable provisions of law. Allowances shall provide for the support, maintenance and needs of one or both parents if in need, and in the home and for the support, maintenance and needs of the other relative if he or she is without sufficient means of support, provided such parent, parents and relative are not receiving federal supplemental security income payments and/or additional state payments for which they are eligible. The social services official may, in his discretion, make the incapacitated parent the grantee of the allowance and when allowances are granted for the aid of a child or children due to the unemployment of a parent, such official may make the unemployed parent the grantee of the allowance.

STATE REGULATIONS

18 N.Y.C.R.R.

§ 352.3. *Rent allowances*

(a) Each social services district shall establish a monthly allowance schedule for rent based on that number of rooms, with or without heat, furniture and furnishings. Such allowance schedule shall provide a sufficient amount for all persons to obtain housing in accordance with standards of public health in the community. The schedule established shall be filed with the department. An allowance for rent shall be made in the amount actually paid by the recipient but not in

Exhibit "2".

excess of the appropriate maximum of such schedule.[*]

• • •

(c) For children or adults in receipt of public assistance residing in the home of a self-maintaining non-legally responsible relative or friend or SSI beneficiary, the allowance for rent and/or other shelter costs shall be computed on a pro rated basis but not in excess of the appropriate agency maximum for the number of people in the assistance grant.[**]

• • •

§ 352.7. *Allowances and Grants for other Items of Need.*

• • •

(f) Allowances for essential persons in ADC . . .

(1) A grant made to a recipient of . . . ADC shall include the needs of other persons, whether the relative or non relative of such recipient, whose presence in the same home as the recipient is essential to the recipient's well-being provided such persons:

(i) reside in the same home as the recipient;

(ii) are eligible for public assistance other than . . . ADC on the basis of income and resources;

(iii) agree to render necessary services and care to the recipient; and further provided that

(iv) the recipient approves the plan.

• • •

---

[*] A state-wide schedule of maximum monthly shelter allowances by county and by public assistance family size is published at 18 N.Y.C.R.R. § 352.3(a) but has not yet become effective.

[**] Effective July 26, 1974. Former subdivision (c) stated: For children or adults in receipt of public assistance residing in the home of a self-maintaining non-legally responsible relative or friend, the allowance for rent and/or other shelter costs shall be computed on a pro rated basis.

Supreme Court, U. S.
FILED
MAR 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-453

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants,

against

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

No. 74-5054

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR, CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, ROSE HURLEY individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Petitioners,

(continued)

against

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, JAMES M. SHUART, individually and in his capacity as Commissioner of the Nassau County Department of Social Services, BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, and LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLEES IN NO. 74-453 AND FOR PETITIONERS IN NO. 74-5054

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INDEX

Page

OPINIONS BELOW 2

JURISDICTION 3

STATUTES AND REGULATIONS INVOLVED 3

QUESTIONS PRESENTED 4

STATEMENT 4

SUMMARY OF ARGUMENT 25

ARGUMENT:

I. THE PRO-RATA REDUCTION OF THE SHELTER ALLOWANCE OF A FAMILY RECEIVING AFDC ASSISTANCE, SOLELY BECAUSE A PARENT ALLOWS A NON-LEGALLY RESPONSIBLE PERSON TO RESIDE WITH THE AFDC FAMILY, VIOLATES THE SOCIAL SECURITY ACT AND IMPLEMENTING HEW REGULATIONS 31

A. *King v. Smith*, 392 U.S. 309 (1968), *Lewis v. Martin*, 397 U.S. 552 (1970), and 45 C.F.R. §233.90(a) forbid New York from assuming that a "lodger" is paying part of the AFDC family's rental expense 32

B. The history, language, and operation of the challenged regulations substantiate that the "lodger" regulations are based on the impermissible assumption that the "lodger" is paying a pro-rata share of the AFDC family's rental expense 41

C. The decision of the Court of Appeals is based on the erroneous premise that the AFDC family's shelter needs are diminished solely because a "lodger". resides in the home 46

Page

II. THE PRO-RATA REDUCTION OF THE SHELTER ALLOWANCE OF A FAMILY RECEIVING PUBLIC ASSISTANCE BECAUSE A NON-LEGALLY RESPONSIBLE PERSON RESIDES WITH THE PUBLIC ASSISTANCE FAMILY CONSTITUTES A CONCLUSIVE PRESUMPTION IN VIOLATION OF THE DUE PROCESS CLAUSE THAT THIS PERSON IS ABLE TO AND DOES PAY PART OF THE FAMILY'S RENT EXPENSE 57

III. A REDUCTION IN A FAMILY'S PUBLIC ASSISTANCE GRANT SOLELY BECAUSE A PARENT ALLOWS A NON-LEGALLY RESPONSIBLE PERSON TO RESIDE IN THE HOME INFRINGES UPON THE RIGHTS OF PRIVACY AND ASSOCIATION AND VIOLATES THE EQUAL PROTECTION CLAUSE 70

A. The "lodger" regulations infringe upon the constitutionally protected rights of privacy and association by penalizing public assistance recipients for inviting a friend or relative into the home 71

B. The State has not demonstrated a compelling interest to justify its infringement of the rights of privacy and association 80

C. The lodger regulations violate the Equal Protection Clause even under the rational basis test 83

IV. EVIDENCE OF ALLEGED GIFTS MADE BY THE LODGER TO THE RECIPIENT PRIOR TO THE TIME THE RECIPIENT'S GRANT WAS REDUCED WAS PROPERLY EXCLUDED BY THE THREE-JUDGE COURT BECAUSE THE ISSUE OF CONTRIBUTION HAD BEEN RESOLVED IN PRIOR PROCEEDINGS BETWEEN THE PARTIES AND WAS IRRELEVANT TO THE SUBJECT MATTER OF THE ACTION 89

Page

V. PLAINTIFFS TAYLOR AND OTEY'S CLAIMS ARE NOT MOOT BECAUSE THE CHALLENGED REGULATIONS HAVE A CONTINUING IMPACT ON THEM AND THERE IS A POSSIBILITY OF FUTURE INJURY 91

VI. THE CLASS WAS PROPERLY DEFINED TO INCLUDE ALL THOSE PERSONS WHOSE PUBLIC ASSISTANCE GRANTS WERE REDUCED OR THREATENED WITH REDUCTION SOLELY BECAUSE OF THE PRESENCE OF A "LODGER" IN THE HOME PURSUANT TO THE CHALLENGED REGULATIONS 94

CONCLUSION 96

APPENDIX "A" 1a

APPENDIX "B" 1b

CITATIONS

Cases:

Bates v. Little Rock, 361 U.S. 516 (1960) 73

Battle v. Lavine, 44 App.Div. 2d 307, 354 N.Y.Supp. 2d 680 (2d Dept. 1973) 41

Baume v. Lavine, 74 Misc. 2d 1046, 347 N.Y. Supp. 2d 355 (N.Y.Sup.Ct. 1973), *rev'd*, 44 App.Div. 2d 336, 355 N.Y.Supp. 2d 477 (3d Dept. 1974) 63

Bell v. Burson, 402 U.S. 535 (1971) 29, 58, 59, 67, 69

Belle Terre v. Boraas, 416 U.S. 1 (1974) 73, 74

Boddie v. Connecticut, 401 U.S. 371 (1971) 20

Page

Boddie v. Wyman, 434 F.2d 1207 (2d Cir. 1970), *aff'd*, 402 U.S. 991 (1971) 12

Boucher v. Minter, 349 F. Supp. 1240 (D.Mass. 1972) (three-judge court) 33, 40, 41, 49, 62, 64

Bower v. Goldmark, D.Mass. No. 74-82-M (July, 9, 1974) 41

Boyd v. United States, 116 U.S. 616 (1886) 72

Breard v. Alexandria, 341 U.S. 622 (1951) 74

Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964) 73

Bunting v. Juras, 502 P.2d 607 (Ore. Ct.App. 1972) 56

Burr v. New Rochelle Housing Authority, 479 F.2d 1165 (2d Cir. 1973) 77

Carleson v. Remillard, 406 U.S. 598 (1972) 31

Carrington v. Rash, 380 U.S. 89 (1965) 58, 66, 67, 85

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) ..... *passim*

Cooper v. Swoap, 11 Cal. 3d 856, 115 Cal.Rptr. 1, 524 P.2d 97, *cert. denied*, 95 S.Ct. 498 (1974) 40

Dandridge v. Williams, 397 U.S. 471 (1970) 30, 83

Davis v. Lavine, 76 Misc.2d 984, 352 N.Y.Supp. 545 (N.Y. Sup.Ct. 1972) 63

Dullea v. Ott, 316 F.Supp. 1273 (D.Mass. 1970) 41

Dunn v. Blumstein, 405 U.S. 330 (1972) 66, 70, 92, 94

Edelman v. Jordan, 415 U.S. 651 (1974) 92

Eisenstadt v. Baird, 405 U.S. 438 (1972) 29, 71, 72, 73, 75, 80

Engleman v. Amos, 404 U.S. 23 (1971) 54, 56

Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir.).,*cert. denied*, 400 U.S. 853 (1970) 77

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 74

Page

Gaither v. Sterrett, 346 F.Supp. 1095 (N.D. Ind.), *aff'd*, 409 U.S. 1070 (1972) 39, 56

Garrity v. New Jersey, 385 U.S. 493 76

Gilliard v. Craig, 331 F.Supp. 587 (W.D. N. C. 1971), *aff'd*, 409 U.S. 807 (1972) 39

Goldberg v. Kelly, 397 U.S. 254 (1970) 54, 59, 66, 68, 69, 85

Goss v. Lopez, 43 U.S.L.W. 4181 (U.S. Jan. 22, 1975) 68

Griswold v. Connecticut, 381 U.S. 470 (1965) 29, 71, 72, 73, 75

Hagans v. Lavine, 415 U.S. 528 (1974) 83

Hausman v. Department of Institutions and Agencies, 64 N.J. 203, 314 A.2d 362, *cert. denied*, 94 S.Ct. 3083 (1974) 40, 45, 49, 51, 53

Heiner v. Donnan, 285 U.S. 312 (1932) 58

Hoeper v. Tax Commission, 284 U.S. 206 (1931) 62

Holmes v. Wyman, 40 App. Div. 2d 50, 337 N.Y. Supp. 2d 470 (1st Dept. 1970) 63

Hurley v. VanLare, 365 F.Supp. 186 (S.D.N.Y. 1973) ..... *passim*

Hurley v. VanLare, 380 F.Supp. 167 (S. and E.D.N.Y. 1974) (three-judge court) ..... *passim*

Jefferson v. Hackney, 406 U.S. 535 (1972) 83

Jenkins v. Georges, 312 F.Supp. 289 (W.D.Pa. 1969) (three-judge court) 40, 45, 51, 62

Johnson v. New York State Education Department, 409 U.S. 75 (1972) 92-93

Jones v. Kurtis, 65 Misc.2d 856, 319 N.Y.Supp. 2d 557 (N.Y. Sup.Ct. 1971), *aff'd*, 37 App. Div.2d 696, 323 N.Y.Supp.2d 671 (2d Dept. 1971) 63

King v. Smith, 392 U.S. 309 (1968) ..... *passim*

Levy v. Louisiana, 391 U.S. 68 (1968) 88

Lewis v. Martin, 397 U.S. 552 (1970) ..... *passim*

Page

Lewis v. Stark, 312 F.Supp. 197 (N.D. Calif. 1968) 56

Lopez v. Vowell, 471 F.2d 690 (5th Cir. 1973), *aff'd*, 411 U.S. 933 (1973) 56

Loving v. Virginia, 388 U.S. 1 (1967) 72

Lund v. Affleck, __F.Supp.__, 43 U.S.L.W. 2324 (D.R.I., Jan. 15, 1975) 56

Mapp v. Ohio, 367 U.S. 643 (1961) 74

Marotti v. White, 342 F.Supp. 823 (D.Conn. 1972) (three-judge court) 49

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1973) 76

Meyer v. Nebraska, 262 U.S. 390 (1923) 71, 72

Moore v. Ogilvie, 394 U.S. 814 (1969) 94

Moreno v. Department of Agriculture, 345 F.Supp. 310 (D.D.C. 1972) (three-judge court), *aff'd on other grounds*, 413 U.S. 528 (1973) 73, 75

Morrisey v. Brewer, 408 U.S. 471 (1972) 59

Mothers and Childrens Organization v. Stanton, 371 F.Supp. 298 (N.D.Ind. 1973) 40, 45, 49, 51, 52, 62, 68

NAACP v. Alabama, 357 U.S. 449 (1958) 72, 73

NAACP v. Button, 371 U.S. 415 (1963) 73

New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973) 44

Nicholson v. Schreck, 75 Misc.2d 676 348 N.Y.Supp. 2d 653 (N.Y. Sup.Ct. 1973) 63

O'Grady v. North Castle, 43 U.S.L.W. 2345 (S. D. N.Y. Jan. 10, 1975) 74

Ojeda v. Hackney, 319 F.Supp. 149 (N.D. Tex. 1970) 56

Olmstead v. United States, (1928) 71

Owens v. Parham, 350 F.Supp. 598 (N.D.Ga. 1972) (three-judge court) 40, 45, 48, 62

Page

Paris Adult Theatre I v. Slaton, 413 US. 49 (1973) 75

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 71, 72

Prince v. Massachusetts, 321 U.S. 158 (1944) 71, 72

Procunier v. Martinez, 416 U.S. 396 (1974) 80

Randall v. Goldmark, 495 F.2d 356 (1st Cir.) *cert. denied*, 95 S.Ct. 144 (1974) 41, 47

Reed v. Reed, 404 U.S. 71 (1971) 69

Reyna v. Vowell, 470 F.2d 494 (5th Cir. 1972) 39

Richardson v. Ramirez, 418 U.S. 24 (1974) 92

Rodriguez v. Vowell, 472 F.2d 622 (5th Cir. 1973), *cert. denied*, 412 U.S. 944 (1973) 39

Roe v. Wade, 410 U.S. 113 (1973) 30, 72, 75, 80, 94

Rosado v. Wyman, 397 U.S. 397 (1970) 31

Roselli v. Affleck, __F.2d__ No. 74-1084 (1st Cir., Dec. 31, 1974), *aff'g*, 373 F.Supp. 36 (D.R.I. 1973) 40

Rosen v. Hursh, 464 F.2d 731 (8th Cir. 1972) 56, 75

Rothstein v. Wyman, 303 F.Supp. 339 (S.D.N.Y. 1969), *vacated and remanded*, 398 U.S. 275 (1970) 77

St. Ann v. Palisi, 495 F.2d 423 (5th Cir. 1974) 88

Schlesinger v. Wisconsin, 270 U.S. 230 (1926) .....

Shapiro v. Thompson, 394 U.S. 618 (1969) 30, 61, 76

Shea v. Vialpando, 416 U.S. 251 (1974) 31, 32, 48-49, 66

Shelton v. Tucker, 364 U.S. 479 (1960) 80

Sherbert v. Verner, 374 U.S. 398 (1963) 30, 70, 76

Smith v. King, 277 F.Supp. 31 (M.D.Ala. 1967), *aff'd on other grounds sub nom. King v. Smith*, 392 U.S. 309 (1968) 85, 86

Solman v. Shapiro, 300 F.Supp. 409 (D.Conn. (three-judge court) *aff'd per curiam*, 396 U.S.S. (1969) 13, 39, 55, 56

Page

Sosna v. Iowa, 43 U.S.L.W. 4125 (U.S. Jan. 14, 1975) 92,93

Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498 (1911) 94

Stanley v. Georgia, 394 U.S. 557 (1969) 71, 72, 73-74

Stanley v. Illinois, 405 U.S. 645 (1972) 29, 58, 59, 65, 68, 69, 85

Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974) 93, 94

Taylor v. Lavine, 497 F.2d 1208 (2d Cir. 1974) ..... *passim*

Townsend v. Swank, 404 U.S. 282 (1971) 31

Turley v. Lefkowitz, 414 U.S. 70 (1973) 76

Tyson v. New York City Housing Authority, 369 F.Supp. 513 (S.D.N.Y. 1974) 88

Uhrovick v. Lavine, 43 App.Div. 2d 481, 352 N.Y.Supp. 2d 529 (3d Dept.), *aff'd*, __N.Y.2d__ (1974) 56

United States v. Leslie Salt Co., 350 U.S. 383 (1956) 46

United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973) 29, 65, 73, 74, 75, 83, 86

United States Department of Agriculture v. Murry, 413 U.S. 508 (1973) 29, 58, 59, 62, 65, 68, 69

Vlandis v. Kline, 412 U.S. 441 (1973) ..... *passim*

Waits v. Swoap, 11 Cal. 3d 887, 115 Cal. Rptr. 21, 524 P.2d 117, *cert. denied*, 95 S.Ct. 499 (1974) 40

Watts v. Lavine, 75 Misc.2d 80, 347 N.Y.Supp.2d 279 (N.Y. Sup.Ct. 1973) 63

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) 88

Williams v. Wohlgemuth, 366 F.Supp. 541 (W.D. Pa. 1973), *aff'd*, 416 U.S. 901 (1974) 86

Woods v. Lavine, 76 Misc.2d 677, 351 N.Y. Supp. 2d 309 (N.Y.Sup.Ct. 1973) 63

Page

Wyman v. James, 400 U.S. 309 (1971) 32, 55, 72, 75

X. v. McCorkle, 333 F.Supp. 1109 (D.N.J. 1970), *aff'd sub nom.*, Engleman v. Amos, 404 U.S. 23 (1971) 56

Federal Provisions:

28 U.S.C. §1253 3
§1254(1) 3
§1343(3) 22
§2281 24
§2284 24

42 U.S.C. §601 et seq 5, 6, 31, 32
§601 ..... 55, 84
§602 45
§602(a)(7) ..... *passim*
§602(a)(13) 85
§602(a)(14) 85
§602(a)(24) 10
§604(b) 88
§605 55
§606(a) 10, 25, 26, 32, 33, 34, 36, 55
§606(b) 54, 55
§1983 22

45 C.F.R. §203.1 ..... 33, 37, 38
§233.10(a)(ii) 49
§233.20(a)(i) 49
§233.20(a)(ii) 37
§233.20(a)(2)(vi)(b) 13, 55, 56
§233.90 ..... passim
§234.11(a) 54
§234.60(a)(2) 54

Civil Rules for the Southern and Eastern Districts of New York, Rule 9(g) 89

Federal Rules of Civil Procedure
Rule 23(b)(2) 92
Rule 23(a)(3) 93

Page

Federal Rules of Evidence, PubL.No. 93-595,
§§401-402 90

HEW Handbook of Public Assistance, Part IV
§3120 37
§3123 91
§5120 54
§3131(7) 37
§5132 54
§5141 54

Social Security Amendments of 1974, Pub.L. No.
93-647, §§2001-2002 55

State Provisions:

N.Y. Constitution, Art. XVII, §1 60

New York Social Services Law
§131(1) 60
§131-a 19, 28, 52, 55, 60, 80, 84
§136(2) 91
§143-b 55
§145 55
§350 84
§350-a 55

18 N.Y.C.R.R. Part 351 ..... 60, 67
§351.2 60

18 N.Y.C.R.R. Part 352 60
§352.1 60
§352.2 60
§352.3 ..... *passim*
§352.11 60
§352.12 60
§352.14 60
§352.15 60
§352.16 60
§352.17 60
§352.23 60
§352.27 60
§352.28 60

Page

§352.29 60
§352.30(c) (1970) 42, 86
§352.30(d) ..... *passim*
§352.31 ..... 43, 60
§352.31(a)(3) (1970) 42, 43, 60, 62
§352.31(a)(3)(iv) ..... *passim*
§353.2(b) (1964) 42, 43
§353.3(a) (1965) 42
§353.3(c) 42, 43

18 N.Y.C.R.R. Part 358 ..... 29, 81
§369.2 60
§381.1 54
§381.2 54
§381.3 ..... 11, 54

Miscellaneous:

Bell, Aid to Dependent Children (1965) 36, 42, 79

Brief of the United States as Amicus Curiae in
Lewis v. Martin, Feb. 1970, p. 7 37

Hearings on H.R. 10606, 87th Cong. 2d Sess.,
p. 138 (1962) 54

HEW, Program Instruction APA-PI-74-8, December
20, 1973 10

HEW, The Role of Public Welfare in Housing,
Report to House Committee on Ways and Means
and Senate Finance Committee, p. 174 (1969) 54

Historical Note to 18 N.Y.C.R.R. §352.31 43

Minutes of the Social Security Board, December 17,
1940, Board Document No. 3950-h, pp. 1-3 37

Money Payments to Recipients of Old Age
Assistance, Aid to Dependent Children and Aid
to the Blind, Bureau Circular No. 17, Bureau of
Public Assistance (1944) 54

New York State Department of Social Services,
Annual Report (1974) 31

Page

Note, AFDC Income Attribution: The Man-in-the-House and Welfare Grant Reduction, 83 Harv.L.Rev. 1370 (1970) 18

Note, On Privacy: Constitutional Protection For Personal Liberty, 48 N.Y.U.L.Rev. 670 (1973) 72

Note, The Mootness Doctrine In the Supreme Court, 88 Harv.L.Rev. 373 (1974) 93

O'Neil, The Price of Dependency (1970) 67

Piven and Cloward, Regulating the Poor (Vintage ed. 1972) 67

Stack, All Our Kin: Stragies for Survival In a Black Community, (Harper and Row, 1974) 17, 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-453

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants,

against

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

No. 74-5054

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR, CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, ROSE HURLEY individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Petitioners,

against

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, JAMES M. SHUART, individually and in his capacity as Commissioner of the Nassau County Department of Social Services, BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, and LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLEES IN NO. 74-453 AND FOR PETITIONERS IN NO. 74-5054

OPINIONS BELOW

The opinion of the single district judge in *Hurley v. Van Lare* is reported at 365 F.Supp. 186 (S.D.N.Y. 1973). (A.74).[1] The opinion of the single district judge in *Taylor v. Lavine*, which adopted the decision of the single district judge in *Hurley v. Van Lare*, is unreported and appears in the Appendix at A.140.

The *Hurley* and *Taylor* actions were consolidated before the United States Court of Appeals for the Second Circuit. The majority and dissenting opinions of the Court of Appeals are reported *sub nom. Taylor v. Lavine* at 497 F.2d 1208 (2d Cir. 1974). (A.157).

Upon remand from the Court of Appeals, the *Hurley*

[1]References to the Appendix are denominated "A."

and *Taylor* actions were consolidated and a hearing was held before a three-judge district court. The majority and dissenting opinions of the three-judge court are reported *sub nom. Hurley v. Van Lare* at 380 F.Supp. 167 (S. and E.D.N.Y. 1974). (A.639).

JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1974. (A.157). A timely petition for rehearing *en banc* was denied by the Court of Appeals on June 18, 1974, with two Judges dissenting. (A.185-186). The Petition for a Writ of Certiorari was filed on August 2, 1974 and was granted by this Court on December 9, 1974. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

The judgment of the three-judge district court was entered on August 15, 1974. (A.661-663). The Notice of Appeal was filed in the district court on August 20, 1974. (A.664-665). The Jurisdictional Statement was filed on October 18, 1974, and this Court noted probable jurisdiction on December 9, 1974. The jurisdiction of this Court rests on 28 U.S.C. §1253.

STATUTES AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are set forth as exhibits to the Brief for Appellants–Respondents.

QUESTIONS PRESENTED

1. Whether New York's "lodger" regulations, which cause a pro-rata reduction in the shelter allowance of a family receiving Aid to Needy Families With Dependent Children assistance solely because a parent allows a non-legally responsible person to reside in the home, violate the Social Security Act and implementing regulations of the Department of Health, Education and Welfare.

2. Whether New York's "lodger" regulations, which cause a pro-rata reduction in the shelter allowance of a family receiving public assistance solely because a parent allows a non-legally responsible person to reside in the home, constitute a conclusive presumption of decreased shelter need in violation of the Due Process Clause of the Fourteenth Amendment.

3. Whether New York's "lodger" regulations, which cause a pro-rata reduction in the shelter allowance of a family receiving public aysistance solely because a parent allows a non-legally responsible person to reside in the home infringe upon the rights of privacy and association in the home, and violate the Equal Protection Clause of the Fourteenth Amendment.

4. Whether the three-judge court properly excluded evidence of alleged gifts made to a recipient by a "lodger" prior to the time the recipient family's grant was reduced, where the issue of contribution was resolved in prior proceedings between the parties and where gifts by a "lodger" have no legal significance under the challenged regulations.

5. Whether the claims of two of the named plaintiffs became moot when their full grants of public assistance were restored where the "lodger" regulations have a

continuing impact on the relationship between the public assistance family and the "lodger" and where the challenged regulations have compelled one plaintiff to ask the non-legally responsible person to leave the household.

6. Whether the three-judge court properly defined the scope of the class.

STATEMENT

Each of the named plaintiffs-appellees-petitioners (hereafter plaintiffs) is a recipient of Aid to Needy Families with Dependent Children assistance (hereafter AFDC) on behalf of herself and her minor children. 42 U.S.C. §601 et seq. Each plaintiff, and the other recipients of public assistance in the plaintiff class, has received a reduced grant of public assistance pursuant to the challenged regulations or has been threatened with such a reduction solely because the caretaker relative has allowed a person who has no legal obligation to support the public assistance family, and who is not a recipient of public assistance, to reside in the public assistance household. 18 N.Y.C.R.R. §§352.30(d); 352.31(a)(3)(iv).

Plaintiffs' public assistance grants have been reduced despite the fact that the person residing in the home has no legal obligation to support the public assistance family, has made no financial contribution or paid any part of the rent, and may even be unable to make such a contribution or payment. Plaintiffs' grants have been reduced without a determination by defendants-appellants-respondents (hereafter defendants) that plaintiffs' shelter needs have been reduced by this person's

presence in the home. The reduction consists of a pro-rata reduction in the public assistance family's shelter allowance.

Plaintiffs contend that the challenged regulations violate the Social Security Act, 42 U.S.C. §601 et seq., implementing regulations of the United States Department of Health, Education and Welfare (hereafter HEW), the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the rights of privacy and association.

Plaintiff Rose Hurley.

Plaintiff Rose Hurley and her three minor children are recipients of AFDC assistance. (A.32,36). She has been living separately from her husband since 1967 and does not know his whereabouts. (A.32).

In 1970 and until July, 1971, Mrs. Hurley and her three children resided in a two bedroom apartment in Mount Vernon, New York. (A.233). The family's rent for this apartment was $150 per month, which is less than the maximum shelter allowance permitted by the Westchester County Department of Social Services for a family of 4 persons (5 rooms). (A.33, 36, 599). The Hurley family did not have more space than necessary for Mrs. Hurley and her children. (A.233-234).

In November and December, 1970 and January and February, 1971, a male friend resided with the Hurley family. (A.33, 36). This friend made no financial contribution to the Hurley family and was under no legal obligation to provide financial support to Mrs. Hurley or her children. (A.33, 36-37). This friend was

not himself a recipient of public assistance.[2] The family's monthly rental obligation was not increased as a result of his presence. (A.33).

During November and December, 1970 and January and February, 1971, the Westchester County Department of Social Services ("local agency") reduced the family's public assistance grant because of the presence of Mrs. Hurley's friend in the home. (A.33, 36). During this four month period the Hurley family used part of their grant for food and clothing to meet their rental obligation. (A.33).

A State "fair hearing" was held on March 22, 1971 pursuant to 18 N.Y.C.R.R. Part 358 to review the determination of the local agency. (A.33, 36). On September 20, 1971, the Acting State Commissioner of the New York State Department of Social Services, defendant Van Lare, upheld the determination of the local agency reducing the Hurley family's grant pursuant to the challenged regulations because of the presence of her friend in the home, except that he held that the reduction should have been $30 per month instead of $35 pursuant to 18 N.Y.C.R.R. §352.31(3)(iv) and 352.30(d). (A.36-37).

Defendant Van Lare's "Decision After Fair Hearing," after finding the facts set forth above, concluded:

> "The record establishes that the man residing with appellant was not willing to assume responsibility for the appellant or her children and there are no children of which he is the acknowledged or adjuciated father. In addition, no contribution is

[2]There is nothing in the record that indicates whether or not this person was employed.

category. (A.228). As of January 1, 1974, she was transferred to the Supplemental Security Income (S.S.I) program. (A.228).[4]

Plaintiff Charlotte Otey.

Plaintiff Charlotte Otey and her minor son Kevin are recipients of AFDC assistance. (A.109,228). They reside in a 2 bedroom apartment in Freeport, New York, for which plaintiff pays $145 per month rent. (A.228-229). Prior to October, 1972, plaintiff received a shelter allowance of $145 from the local agency, the maximum shelter allowance for a family of 2 residing in Nassau County. (A.228-229,551).

On October 1, 1972, plaintiff's adult son, Michael Otey, then 24, came to reside with his mother and younger brother. (A.229). While he resided with plaintiff, Michael Otey was unemployed except for occasional temporary jobs. (A.229). He is not obligated to support his mother and younger brother and in fact made no financial contribution to them and paid no part of the rent. (A.229). Michael had also resided with the family on several occasions prior to October, 1972 and after he had reached age 18. (A.229).[5]

[4]By a 1972 amendment to the Social Security Act, a recipient of S.S.I. assistance who resides with an AFDC family "shall not be regarded as a member of the [AFDC] family for purposes of determining the amount of the benefits of the [AFDC] family...." 42 U.S.C. §602(a)(24). HEW has construed this provision to mean that "the need ... and the amount of assistance payment should be determined as though the SSI beneficiary were not in the home." HEW Program Instruction APA-PI-74-8, December 20, 1973.

[5]Age 18 is the cut off point for A.F.D.C. assistance for a minor not attending school full time. 42 U.S.C. §606(a).

On October 26, 1972, plaintiff was advised by the local agency that the family's shelter allowance would be reduced for the following reason: "You must share shelter with your son, Michael Otey. Your share of shelter is 96.65 [2/3 x $145]." (A.114).

Plaintiff Otey requested a State "fair hearing" to review the reduction in her shelter allowance. (A.229). She failed to appear for the hearing because her older son Michael had advised her that he would either find a job and contribute to the household or leave the State and stay with relatives in West Virginia. (A.229).

As a result of the reduction in the family's shelter allowance, rent arrears of $48.34 accrued each month and the family was threatened with eviction. (A.137-138,229). The local agency subsequently made a direct grant of the rent arrears to the landlord to forestall the family's eviction, and attempted to "restrict" plaintiff's shelter allowance, i.e., to mail the reduced rental allowance directly to the landlord.[6] (A.126,229). This restriction was nullified in a "Decision After Fair Hearing" in which defendant Lavine found that the restriction was improper because there was no evidence of mismanagement, "especially since the evidence establishes that appellant used all of her shelter allowance and a few dollars more to make the partial rent payment she made." (A.127,230).

In February, 1974, Michael Otey left his mother and brother to reside independently. (A.230). Since he left, plaintiff Otey has been receiving a full shelter allowance. (A.230).

[6]See 18 N.Y.C.R.R. §381.3(a).

Other Members of the Class.[7]

Phyllis D'Alessio.

Phyllis D'Alessio and her two minor children are recipients of AFDC assistance. (A.44,269-270). They receive a monthly grant of $354 which includes a shelter allowance of $175 to meet their actual rent of $175, including heat. (A.270,272). This rent is less than the maximum allowed for a family of 3 persons residing in Westchester County. (A.599). They live in a 2 bedroom apartment in Mount Vernon, New York which was characterized by an expert witness as "far below a modern standard for . . . a family of that size." (A.271-272,305-306,327). She has sought to obtain a divorce, but the Legal Aid Society was unable to commence a divorce proceeding because she could not afford the necessary disbursements. (A.45,48-52,269).[8]

Over the past six years Mrs. D'Alession has been hospitalized several times for surgical and other treatment. (A.270). Because of her illness and periods of convalescence, plaintiff has not been able to carry out most of the family and household functions. (A.45,270).

A male friend resides with the D'Alessio family. (A.269). He resides in one bedroom with Mrs. D'Allesio. (A.271-272). The children sleep on bunk beds in the second bedroom, which is not large enough for adjoining beds. (A.272). The fact that the male

[7]The facts of the members of the class set forth below are those of proposed plaintiff-intervenors.

[8]This was prior to this Court's decision in Boddie v. Connecticut, 401 U.S. 371 (1971).

friend resides with the D'Alessio family does not mean that the family has more space than necessary for Mrs. D'Alessio and her children. (A.272). "During Mrs. D'Alessio's periods of illness and convalescence, he took care of her and her children, shopped for food, washed the family's clothes, cooked the family's meals, cleaned the house and performed other household tasks. He, himself, has various disabilities including extreme high blood pressure and he is presently unable to work. He is under no legal obligation to support the family and, in fact, has provided no financial support." (A.269-271, 277,643). He pays no part of the family's rental expense. (A.271,277). The children regard him as their father. (A.270).[9]

This male friend is not a recipient of public assistance and has not applied for assistance because "he wants nothing to do with public assistance." (A.271,287). The family's rental expense was not increased because of his presence in the home. (A.271).

On or about January 22, 1973, Mrs. D'Alessio received a letter from the local agency stating that her public assistance grant would be reduced from $336.00 to $292.40. (A.274,488-489). The letter stated: "Quality control reports of 1/15/72 indicate that Mr. Mattrola [sic] resides with you and your family. Therefore we are pro-rating your rent 3/4 of 175 =

[9]This male friend is not an "essential person" under 42 U.S.C. §602(a)(7), since an essential person must be designated as such by the recipient, and the recipient has not in this case done so. Solman v. Shapiro, 300 F.Supp. 409, 415 (D. Conn.) (three-judge court), *aff'd per curiam*, 396 U.S. 5 (1969); 45 C.F.R. §233.20(a)(2)(vi)(b) (1973).

131.40." (A.488-490).[10] A reduction in Mrs. D'Alessio's shelter allowance of $43.60 per month would leave insufficient funds for food and other necessaries for her children and her herself. (A.275-276, 281-282,306-307, 328-329).

She explained why she would not request that her male friend contribute to the family's rental expense:

> "This man has just come out of the Veterans Hospital after three weeks of hospitalization, and he is not fit for work right now due to extreme high blood pressure, hypertension. And his only way of work is a golf course, and he is not going to go out on the golf course and have a stroke, so that he can pay $43 a month rent." (A.286).

Loretta Clark.

Loretta Clark and her five minor children are recipients of AFDC assistance. (A.58). They reside in Buffalo, New York. Mrs. Clark is divorced. (A.58). A male friend, who has no legal obligation to support the Clark family and who in fact has not provided any support, resides with the Clark family. (A.59). He helps with the family housework, in preparing the meals and in caring for the children. (A.59). Mrs. Clark's monthly rent is $75. (A.64).

Pursuant to the challenged regulations, defendant Lavine, in his "Decision After Fair Hearing" dated February 14, 1973, upheld a reduction in the Clark

[10]Defendants have agreed to provide Mrs. D'Alessio and her children with a full grant of assistance pending the outcome of this litigation. (A.87-88, 275).

family's shelter allowance, reducing the family's semi-monthly grant from $204 to $137. (A.63-65). The decision stated:

> "As there was no evidence presented to establish that the unrelated person in appellant's household was contributing at least $15.00 per month, the agency correctly determined to pro-rate the family's shelter allowance including fuel for heating. . . ." (A.65).

The Clark family has continued to receive a reduced shelter allowance because of the presence of Mrs. Clark's male friend in the home. (A.239). This has required Mrs. Clark to use part of the basic grant for food and clothing to meet the family's rental obligation. (A.239).

Francesca Aloise.

Francesca Aloise and her minor son are recipients of AFDC assistance. Because her adult son, who is not eligible for public assistance, resides with them, defendants have reduced the family's shelter allowance by 1/3 or by approximately $53 per month, pursuant to the challenged regulations. (A.211-214).

The Expert Testimony:

Dr. Herbert Gans, a sociologist and urban planner (A.296-297, 496-521), explained why it is prevalent among the poor for non-legally responsible relatives or friends to reside with the family:

> "[P]oor people double up because they don't have any other alternative." (A.310).

. . .

"Poor people often live a very insecure existence. . . . So, quite frequently you do get a pattern among poor people, if they can't work or they can't find work either temporarily or premanently, of moving in with a relative, either temporarily or permanently, because there simply isn't any money to establish or to continue to maintain one's own household. And typically, then, the people then become lodgers, help out in the family in various ways in lieu of paying rent, helping to raise the children, taking care of the house, doing a variety of things. (A.298)[11]

. . .

"[W]here there is poverty and insecurity people get very dependent on each other to tide them over during crises, so that you have, and this has been found in studies all over the world among poor people . . . a very generous extension of help and hospitality to others, relatives and close friends.

"And this exists not because poor people are necessarily more altruistic or more generous than other people, but because this is really the only way you can survive in a crisis. If you don't have somebody who you can rely on to bail you out with a couple of dollars to get you to the hospital, if one of your kids suddenly gets sick, to provide you a room if your landlord evicts you or if your building burns down or becomes uninhabitable, if this ability to call on somebody for help is not available, then survival for the poor is much more risky. And so what happens is you get a pattern of mutual help, of mutual obligation, people helping each other because they know if they help somebody when they have a problem, they will be helped in return." (A.302-303).

[11]See also, A.240-241, 299-300.

. . .

"One part of this helping phenomenon is people making room in their house for somebody who is in need of shelter temporarily or permanently, and again only in this case on the grounds that if I don't do it for him or her now, he won't do it for me when I am faced with that problem." (A.303).[12]

While welfare recipients are already residing in "inadequate space", (A.305) he explained why welfare recipients often choose to share their inadequate housing with others:

"[E]specially [in] the New York area, they get small rooms, if they are [on] Welfare . . . so they live in a minimum space to begin with.

"When somebody else comes in they become more crowded, obviously. But the exchange—they make this sacrifice because again this is a perfect example of obligation of mutual help that I discussed earlier. You make a sacrifice because then you obligate the other person to help you when you are in need." (A.312-313).

Dr. Gans stated that this "doubling up phenomenon among poor people . . . is particularly [prevalent] . . . where the head of the household is a woman." (A.301). A "lodger" who resides with the family very often "feel[s] that [his] poverty is temporary . . . and [doesn't] want to get involved with being on welfare—welfare itself is a full-time job quite often. . . . Other people . . . just have the pride of independence . . . and say they want to make it on their own however that is going to be." (A.298-299).

[12]Accord, C. Stack, *All Our Kin: Strategies for Survival In A Black Community*, pp. 28-31, 40-41, 43, 45, 107, 123-125, 129 (1974); A. 474-475.

The enforcement of the challenged regulations often forces the male friend out of the house:

> ". . . I am talking generally [about] what happens in the poor community.
>
> "Quite often the relationship between men and women is a very fragile one, particularly when the men are . . . economically marginal in society and told that they are not useful economically, (a) the men don't have much money, (b) their egos are very sensitive and they might just say well, if you ask me to pay I will just move out on you and that would be the end of—in essence, the relationship would be sacrificed to whatever the rental money was.
>
> "[I]f the lodger is a man who is living with a woman, he becomes a lodger to serve a variety of functions in the family, helping raise the children, taking care of the house. I think the relationships are such that if the woman asked him for money, in most cases he doesn't have it, even if he had it he might say well, if you put it on that basis, I will just move out and then the woman is deprived of the relationship with the man which is part of life and of the fatherly functions that this kind of lodger often performs." (A.314).[13]

Paul Davidoff.

Paul Davidoff, an urban planner, (A.316-319), testified about the severe shortage of adequate housing in New York State, and the low vacancy rates.

[13]See, C. Stack, *All Our Kin: Strategies for Survival In A Black Community*, 112 (1974); Note, AFDC Income Attribution: The Man-in-the House and Welfare Grant Reductions, 83 Harv. L. Rev. 1370, 1373, 1374, 1383 (1970).

(A.321-324,411,417).[14] He referred to studies which substantiate "that welfare families live disproportionately in the worst housing [,] in the most overcrowded housing [and,] in housing that is of exceptionally high rent relative to income abilities." (A.246-248,324,367,369-374,412-413,456, 471-472,474-476). One of these studies establishes that *"there is no question of the concentration of the welfare tenantry in [New York] City's oldest and poorest categories of housing."* (A.369) (emphasis in original). Because "many welfare recipients are overcrowded", (A.372,471), Mr. Davidoff testified that it is highly unlikely that families in the plaintiff class have excess space. (A.339).

New York's Public Assistance Shelter Policies:

In New York, a public assistance family's rental allowance is computed as an item of need separate from the basic standard of need for the other necessities including food and clothing. *N.Y. Social Services Law*, §131-a.[15] Rent allowances are provided pursuant to 18 N.Y.C.R.R. §352.3. Pursuant to this section, each local

[14]There is an "almost zero vacancy rate for low-rental housing in large parts of New York State. . . ." (A.649).

[15]The standard of need which is the basis for the computation of the "basic grant" and which covers items of necessity other than shelter is as follows:

Number of Persons in Household

One	Two	Three	Four	Five	Six
$94	$150	$200	$258	$318	$368

"For each additional eligible person in the household there is added an additional allowance of fifty dollars monthly." *N.Y. Social Services Law* ,§131-a(2)(3).

social services district in New York has established a schedule of maximum shelter allowances based on the number of persons in the household who are eligible for public assistance. (A.526-603).[16] Section 352.3(a) provides that the maximum shelter "allowance schedule shall provide a sufficient amount for all persons to obtain housing in accordance with standards of public health in the community." 18 N.Y.C.R.R. §352.3(a). The rental allowance provided pursuant to section 352.3(a) is thus designed to meet the public assistance family's actual rental obligation and reflects the actual shelter needs of the AFDC family. *Boddie v. Wyman*, 434 F.2d 1207, 1209 (2d Cir. 1970), *aff'd*, 402 U.S. 991 (1971). ("Shelter costs [are] paid as needed.")[17]

The challenged regulations cause a pro-rata reduction of the family's shelter allowances provided pursuant to section 352.3 solely because a caretaker relative in a family receiving public assistance allows a person, who has no legal obligation to support the public assistance

[16]Contrary to defendants' statements, Brief of Appellants-Respondents, pp. 8, 38 fn, the regulations do not contemplate separate shelter grants for each recipient in the home but one shelter allowance to meet the shelter needs of the entire public assistance family.

[17]The average monthly shelter allowance provided by New York ranges from $80 for a single person to $129 for a household of seven or more persons. (A.614). The average shelter allowance for a four person household is $113. (A.614). While defendants claim that the shelter allowances provided pursuant to section 352.3 meet the full shelter expenses for 93% of the recipients (A.343), it should be noted (1) that the study pursuant to which this figure was obtained gave no consideration to the adequacy of housing (A.344) and (2) that the State has promulgated proposed schedules, 18 N.Y.C.R.R. §352.3(a) (A.523-525) that would substantially increase the shelter allowances provided to recipients. (A.526-603).

family, and who is not a recipient of public assistance, to reside with them. 18 N.Y.C.R.R. §§352.30(d); 352.31(a)(3)(iv). The regulations term this non-legally responsible person a "lodger." The facts reveal, however, that this so-called "lodger" may in fact be a disabled friend, an adult unemployed son, or an incapacitated sister.

Plaintiffs emphasize that they are not seeking an additional shelter grant for the "lodger." Plaintiffs only seek to maintain their shelter allowances at an amount allowed for the number of *eligible* persons in the home, and to prevent reductions from this amount pursuant to the challenged regulations.

Under the "lodger" regulations, the public assistance family's shelter allowance is reduced without any determination by defendants as to whether the non-legally responsible person has made a financial contribution to the family or has paid any part of the rent expense, or is even able to make such a contribution or payment, and even though the non-legally responsible person's presence in the house does not increase the rental expense to the public assistance family or to the State. (A.36-37, 63-65, 120-121, 211-214). When this non-legally responsible person leaves the family's home, the full shelter allowance is restored. (A.230).

The challenged regulations come into operation irrespective of the adequacy of the public assistance family's space. (A.348). Defendants' expert witness, a Senior Program Specialist for the New York State Department of Social Services (A.257), testified that "you have a set amount of space that you and your family are living in. If someone else comes to live with

you, this is not to say that before you had too much space." (A.348). If the recipient family moves into a smaller apartment, and the "lodger" resides with them, the shelter allowance will again be reduced pro-rata no matter how small the apartment is and no matter how low the family's rental expense is. (A.333-334).

Proceedings Below:

Plaintiff Hurley commenced a class action pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) in the United States District Court for the Southern District of New York on August 11, 1972. (A.1). Plaintiffs Taylor and Otey commenced a similar class action in the District Court for the Eastern District of New York on May 17, 1973. (A.7).

By decision dated October 3, 1973, the District Court in the *Hurley* action held: (1) that the court had subject matter jurisdiction over the constitutional claims presented and would exercise pendent jurisdiction over the Social Security Act claim; (2) that the action was a proper class action; and (3) that the challenged State regulations were invalid because they conflicted with the Social Security Act and its implementing regulations, particularly 45 C.F.R. §233.90, as construed by this Court's decisions in *King v. Smith*, 392 U.S. 309 (1968) and *Lewis v. Martin*, 397 U.S. 552 (1970), in that they impermissibly conclusively assume that the non-legally responsible person is contributing towards

the family's shelter expense. *Hurley v. Van Lare*, 365 F.Supp. 186 (S.D.N.Y. 1973). (A.74).[18]

By decision dated October 10, 1973, the District Court in the *Taylor* action found the decision in the *Hurley* action "convincing" and "adopted" its "reasoning on class action status, jurisdiction, inconsistency of the state regulation and injunctive relief. . . ." (A.140,142).

Defendant Lavine appealed from the judgments of the District Courts to the United States Court of Appeals for the Second Circuit. The actions were consolidated on appeal *sub nom. Taylor v. Lavine*. On May 14, 1974, the Court of Appeals, by a two to one vote, reversed the judgments of the District Courts. *Taylor v. Lavine*, 497 F.2d 1208 (2d Cir. 1974). (A.157).

The majority decision of the Court of Appeals (per Judge Hays) acknowledged "that federal law prohibits a conclusive presumption of support. . . ." *Taylor v. Lavine*, 497 F.2d 1208, 1215 (2d Cir. 1974). (A.167). The majority decision held, however, that the challenged regulations do not presume that the non-legally responsible person is paying his or her share of the rent, but rather "are based on the fair inference from the presence of the lodger in the household that the A.F.D.C.–recipient family actually needs less space for its own use than it is paying rent for. . . . They merely prevent non-eligible persons from benefiting from free living space." *Taylor v. Lavine*, 497 F.2d 1208,

[18]The court denied two motions to intervene as parties plaintiffs as unnecessary because "the proposed intervenors fall within a class action designation." Hurley v. Van Lare, 365 F.Supp. 186, 195-197 (S.D.N.Y. 1973). (A.86-88).

1215-1216 (2d Cir. 1974). (A.168-169). Judge Oakes, dissenting, found that the challenged regulations violate the mandate of the Social Security Act, as interpreted by this Court, "that *a child's resources are to be measured in actuality, not on the basis of a presumption.*" *Taylor v. Lavine*, 497 F.2d 1208, 1219 (2d Cir. 1974). (A.176). (emphasis in original).[19]

The Court of Appeals found the constitutional claims substantial and remanded them for the convening of a three-judge court pursuant to 28 U.S.C. §§2281 and 2284. A consolidated three-judge court was convened and, on August 5, 1974, the three-judge court, by a two to one vote, held that the challenged regulations created a conclusive presumption in violation of the Due Process Clause that whenever there is a "lodger" in the home, the family has decreased shelter needs. *Hurley v. Van Lare*, 380 F.Supp. 167 (S.D. and E.D.N.Y. 1974). (A.639). The majority held that due process requires "the state [to] make an individualized determination of whether the presence of the lodger does *in fact* diminish the family's shelter needs." *Hurley v. Van Lare*, 380 F.Supp. 167, 175 (S.D. and E.D.N.Y. 1974) (A.653). (emphasis in original). The court found it unnecessary to decide the equal protection claim because it "overlaps" with the due process claim, and found no violation of the rights of privacy and association. (A.654-655).[20]

[19]On June 18, 1974, the Court of Appeals denied plaintiffs' petition for a rehearing *en banc*. Two Judges dissented from the denial of *en banc* review. (A.185-186).

[20]The action was recertified as a class action before the three-judge court, A.662, without opposition by defendants. (A.661).

Circuit Judge Hays, dissenting, found that "[i]t is clear that the New York regulation 'presumes' that a lodger has the will and means to contribute his or her share toward housing expenses. . .," but that these presumptions "may be refuted at the lodger's initiative" if the "lodger" applies for public assistance. *Hurley v. Van Lare*, 380 F.Supp. 167, 178 (S.D. and E.D.N.Y. 1974). (A.658).

On December 9, 1974, this Court noted probable jurisdiction to review the decision and judgment of the three-judge court in *Hurley v. Van Lare*, and granted the Petition for a Writ of Certiorari to review the decision and judgment of the United States Court of Appeals in *Taylor v. Lavine*.

SUMMARY OF ARGUMENT

I.

New York's "lodger" regulations work a reduction in the shelter allowance of a family receiving AFDC assistance solely because a parent allows a person who is not a recipient of public assistance and who has no legal obligation to support the AFDC family to reside in the home. These regulations cause a reduction in the shelter allowance even where the "lodger" has no available income. The AFDC family's shelter allowance is reduced despite the fact that the family's available income and shelter needs do not change as a result of the lodger's presence.

Plaintiffs contend that the "lodger" regulations conflict with 42 U.S.C. §§602(a)(7) and 606(a), and with 45 C.F.R. §233.90(a), as these provisions were

construed by this Court in *King v. Smith*, 392 U.S. 309 (1968) and *Lewis v. Martin*, 397 U.S. 552 (1970).

In *King v. Smith*, 392 U.S. 309 (1968), this Court held that Alabama's substitute father rule violated the Social Security Act. 42 U.S.C. §601 et seq. The Court held that Alabama's definition of "parent", which included a person with no legal obligation of support who in fact provided no support to the needy children, conflicted with 42 U.S.C. §606(a) and the purposes of the AFDC program and left Alabama's needy and dependent children "without meaningful protection." *King v. Smith*, 392 U.S. 309, 330 (1968). The Court held that the only kind of person whose presence in the home would adequately protect the children and thus justify the denial of AFDC assistance is one with an obligation of support equivalent to that of a natural parent. *King v. Smith*, 392 U.S. 309, 332 (1968).

The New York "lodger" has precisely the same characteristics that made the presence of Alabama's "substitute parent" insufficient to insure that needy and dependent children would be supported and protected. Both the New York "lodger" and Alabama's "substitute parent" (a) have no legal obligation to support the children and in fact provide no support, and (b) need not have any income or the capacity to earn income. A reduction in the AFDC family's grant solely because of the "lodger's" presence in the home violates 42 U.S.C. §606(a) and, to the extent of the reduction, leaves New York's needy and dependent children as unprotected as the Alabama children in *King*.

The lodger regulations conflict with 42 U.S.C. §602(a)(7) and 45 C.F.R. §233.90(a). The predecessor of section 233.90(a) was promulgated by HEW to

implement this Court's decision in *King*, and was held valid by this Court in *Lewis v. Martin*, 397 U.S. 552 (1970), because it implements 42 U.S.C. §602(a)(7) and furthers the purposes of the Social Security Act.

Section 233.90(a) provides that "the inclusion in the family, or the presence in the home, of a 'substitute parent' or 'man-in-the-house' or any individual other than [a person with a support obligation equal to that of a natural parent] is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State."

Section 233.90 prohibits the state from reducing the AFDC grant even where (a) the person in the home has some legal duty of support, but less than that of a natural parent, and (b) the person in the home in fact has income.

The New York regulations are based on the premise that the "lodger could, should, and therefore would, pay his or her proper share of the rent. . . ." *Hurley v. Van Lare*, 380 F.Supp. 167, 170 (S.D. and E.D.N.Y. 1974). (A.642). New York is attempting to accomplish indirectly by a double presumption that the "lodger" has available income *and* is applying it to the family's shelter expense what *Lewis* and 45 C.F.R. 233.90(a) clearly prohibit to be done by a single presumption that the available income of one with no legal obligation of support will be applied to meet the family's needs. *Hurley v. Van Lare*, 365 F.Supp. 186, 195 (S.D.N.Y. 1973). (A.85).

The fact that a "lodger" receives benefits and comforts from residing in the AFDC household was not an acceptable basis for terminating or reducing a family's assistance in *King* and *Lewis*, because a

reduction on this basis conflicts with the "paramount goal", *King v. Smith*, 392 U.S. 309, 325 (1968), of the AFDC program of protecting and aiding needy and dependent children. New York thus may not reduce the AFDC grant on this basis.

II

Despite the fact that New York purports to meet 100% of the needs of its public assistance recipients, New York Social Services Law, §131-a(1); 18 N.Y.C.R.R. §352.3, the challenged regulations work a reduction in the family's shelter allowance irrespective of whether the public assistance family's shelter needs have *in fact* decreased as a result of the "lodger's" presence in the home. Defendants make no determination (a) whether the lodger has paid part of the family's rental expense or is even capable of making such a payment, (b) whether the non-legally responsible person's presence in the home results in an increase in the family's rental expense, or (c) whether the "lodger's" presence means that the public assistance family has more space than necessary to meet its housing needs. The challenged regulations thus conclusively presume from the "lodger's" presence in the home that the "lodger" has paid part of the rent and that the public assistance family's shelter needs have decreased. This presumption is "not necessarily or universally true in fact." *Vlandis v. Kline*, 412 U.S. 441, 452 (1973). This presumption is thus a conclusive presumption which violates the Due Process Clause. *Cleveland Board of Education v. La Fleur*, 414 U.S.

632 (1974); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971).

The State can reasonably make case by case determinations whether the family's shelter needs have *in fact* decreased at State fair hearings which the State provides pursuant to 18 N.Y.C.R.R. Part 358. The factual issues to be resolved are the same issues that HEW, 45 C.F.R. §233.90(a), and this Court, *Lewis v. Martin*, 397 U.S. 552 (1970), have concluded must be determined on an individualized basis.

III.

The challenged regulations create two classes of equally needy families receiving public assistance. One class, consisting of families in which no lodger resides, receives a full grant of assistance. The second class, despite being equally needy, receives a reduced grant of assistance solely because the parent allows a non-legally responsible person who is not a recipient of public assistance to reside in the home.

A parent's decision to allow another person to reside in the home is constitutionally protected by the related rights of privacy and association. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965). See also *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). The classification created by the challenged regulations infringes on these constitutionally protected rights because the family is penalized, by a reduction in its

public assistance grant, for choosing to allow another person to reside with them. Should this person leave the public assistance household, the full public assistance grant is restored. No matter how little space the family has and no matter how low its rental expense, its public assistance grant is reduced if it chooses to allow this person to live in their home.

Because the regulations infringe upon the rights of privacy and association, defendants must show a compelling interest to justify the classification created. See *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Sherbert v. Verner*, 374 U.S. 398 (1963). No compelling interest exists because the State has a reasonable alternative method to accomplish its interest of ensuring that it not expend more funds than necessary to meet the needs of those eligible for public assistance. The State can make individualized determinations at State "fair hearings" of whether a family's shelter needs have in fact decreased, thus justifying a reduction in the family's grant.

Even if judged by the rational basis test, *Dandridge v. Williams*, 397 U.S. 471 (1970), the regulations violate the Equal Protection Clause because they arbitrarily work a reduction in the family's public assistance grant since the grant is reduced despite the fact that the public assistance family unit and its shelter needs and rental obligation remain unchanged as a result of the parent's decision to invite the "lodger" into the home. A reduction in the public assistance grant under these circumstances does not further any legitimate governmental interests.

ARGUMENT

I.

THE PRO-RATA REDUCTION OF THE SHELTER ALLOWANCE OF A FAMILY RECEIVING AFDC ASSISTANCE, SOLELY BECAUSE A PARENT ALLOWS A NON-LEGALLY RESPONSIBLE PERSON TO RESIDE WITH THE AFDC FAMILY, VIOLATES THE SOCIAL SECURITY ACT AND IMPLEMENTING HEW REGULATIONS.

It is well established that states participating in the AFDC program must comply with the provisions of the Social Security Act of 1935 as amended, 42 U.S.C. §601 et seq., "and with rules and regulations promulgated by H.E.W.." *King v. Smith*, 392 U.S. 309, 317, 333 fn. 34 (1968). Accord, *Shea v. Vialpando*, 416 U.S. 251 (1974); *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971); *Rosado v. Wyman*, 397 U.S. 397 (1970); *Lewis v. Martin*, 397 U.S. 552 (1970).[21] State statutes and regulations that conflict with these federal provisions are invalid under the Supremacy Clause of the Constitution. See *Townsend v. Swank, supra* at 285.

Plaintiffs contend that the challenged state regulations, which cause a reduction in the shelter allowance received by an AFDC family solely because the parent allows a non-legally responsible person to reside in the

[21]New York receives approximately $570,000,000 from the United States government for its AFDC program. The Annual Report of the New York State Department of Social Services, Appendix B (1974).

home, conflict with the Social Security Act and implementing HEW regulations, and are therefore invalid under the Supremacy Clause.

A. *King v. Smith*, 392 U.S. 309 (1968), *Lewis v. Martin*, 397 U.S. 552 (1970), And 45 C.F.R. §233.90(a) Forbid New York From Assuming That A "Lodger" Is Paying Part Of The AFDC Family's Rental Expense.

The "paramount goal" of the federal AFDC program is the furnishing of aid and resources to protect needy and dependent children. *King v. Smith*, 392 U.S. 309, 325 (1968). Accord, *Shea v. Vialpando*, 416 U.S. 251 (1974); *Wyman v. James*, 400 U.S. 309, 318 (1971); 42 U.S.C. §§601, 606. The Social Security Act defines a "dependent child" as a "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home or physical or mental incapacity of a parent . . .", and who is living with a specified relative. 42 U.S.C. §606(a).

In order to carry out this goal, Congress has required the states to determine eligibility and the amount of AFDC benefits to which a family is entitled on the basis of actual rather than assumed income and resources, and to refrain from declaring needy and dependent children ineligible or reducing their assistance because of their caretaker relatives' association with a "substitute" parent or any other person who does not have a legal obligation to support the children equivalent to that of a natural parent. 42 U.S.C. §602(a)(7); *Lewis v. Martin*, 397 U.S. 552 (1970); *King v. Smith*, 392 U.S. 309 (1968). See also *Shea v. Vialpando*, 416 U.S. 251 (1974).

The challenged regulations clash with these fundamental principles. The regulations cause a reduction in the AFDC family's shelter allowance *solely* because a caretaker relative allows a non-legally responsible person to reside with the AFDC family. The grant is reduced even though this person makes no constribution to the AFDC family, and even though he or she may be unable to make such a contribution. The family's shelter allowance is reduced despite the fact that there has been no change in the rental expense to the family or the State, and despite the fact that there has been no change in the family's shelter needs. In sum, the family's shelter allowance is reduced even though the AFDC family unit and its income, resources and needs remain unchanged in law and in fact. See, *Boucher v. Minter*, 349 F.Supp. 1240, 1244 (D. Mass. 1972) (three-judge court).

The challenged regulations thus thwart the congressional goal of aiding and protecting needy and dependent children. More specifically, the regulations operate so as (1) to define "parent" in a manner that conflicts with 42 U.S.C. §606(a), as construed by this Court in *King v. Smith*, 392 U.S. 309 (1968), and (2) to presume the availability of income and decreased shelter need in conflict with 42 U.S.C. §602(a)(7) and 45 C.F.R. §233.90(a), as construed by this Court in *Lewis v. Martin*, 397 U.S. 552 (1970).[22]

In *King v. Smith, supra*, this Court invalidated Alabama's substitute father rule. That rule disqualified from AFDC eligibility needy children whose mothers cohabited in the home or elsewhere with a male who was "not the father of any of [the] children, [was] not

[22]45 C.F.R. §233.90(a) was previously 45 C.F.R. §203.1.

legally obligated, under Alabama law, to support any of [the] children [and] was not willing or able to support the . . . children, and [did] not in fact support them." *King v. Smith*, 392 U.S. 309, 315-316, 329 (1968).

This Court held that Alabama's definition of "parent", as including a person with no legal obligation of support and who in fact provided no support to the needy children, conflicted with 42 U.S.C. §606(a) and the purposes of the AFDC program and left Alabama's needy and dependent children "without meaningful protection." *King v. Smith*, 392 U.S. 309, 330 (1968). "[T]he only kind of 'parent,' under §406(a), whose presence in the home would provide adequate economic protection for a dependent child is one who is legally obligated to support him." *King v. Smith, supra* at 332. The state's "interest in economically allocating its limited AFDC resources [is] protected by its undisputed power to set the level of benefits and the standard of need, and by its taking into account in determining whether a child is needy all actual and regular contributions to his support." *King v. Smith, supra*, at 334.

The New York "lodger" has precisely the same characteristics that made the presence of Alabama's substitute parent insufficient to ensure that needy and dependent children would be supported and protected. *Taylor v. Lavine*, 497 F.2d 1208, 1217 (2d Cir. 1974) (Oakes, J., dissenting). (A.173). In each case the "person-in-the-home" has no legal obligation to support the children and in fact provides no support. Both rules operate irrespective of the amount of income of the "person-in-the-home," and irrespective of his or her capacity to earn income. Both the Alabama rule and New York's regulations are "unrelated to need, because

the actual financial situation of the family is irrelevant. . . ." *King v. Smith*, 392 U.S. 309, 320 (1968). The only difference between Alabama's rule and New York's regulations is that New York, rather than completely denying assistance because the caretaker relative allows a non-legally responsible person to reside in the home, reduces the AFDC grant for this reason.[23] This Court in *King*, however, did not imply that a state may reduce rather than deny AFDC assistance upon the fiction that the children's needs have decreased as a result of the presence in the home of a person with no legal obligation of support. To the extent of this reduction, New York's children are left "without meaningful protection." *King v. Smith*, 392 U.S. 309, 330 (1968). They are deprived of AFDC assistance despite the fact that the family's resources, rental obligation and needs remain unchanged.

While the "lodger" regulations are applied whenever any non-legally responsible person resides in the public assistance family's home, and not only when an adult male resides in the home, this does not lessen the applicability of *King* since the children are equally needy and dependent whether the person in the home is a "substitute father," a disabled sister, an unemployed adult son or any other non-legally responsible

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[23] "The New York regulation . . . determines the level of payment to the eligible family on the basis of the presence or absence of a lodger in the recipient household." Taylor v. Lavine, 497 F.2d 1208, 1214 (2d Cir. 1974). (A.166).

individual.[24] The essential point is that the "lodger", like Alabama's substitute parent, does not have the characteristics of a "parent", 42 U.S.C. §606(a), that provide the children with meaningful protection.

This Court in *King* recognized that the dimension of the question at issue extended beyond state rules which disqualified the AFDC children on the basis of a fictional parent, to any rule which assumed resources and income available to needy children which were not in fact available. *King v. Smith*, 392 U.S. 309, 319 fn. 16 (1968). The Court recognized the close relationship between the definition of "parent" in 42 U.S.C. §606(a) and the definition of available income and resources in 42 U.S.C. §602(a)(7)[25] and implementing HEW regulations. *Id.*

Following this Court's decision in *King*, HEW promulgated regulations designed to implement 42 U.S.C. §606(a). *Lewis v. Martin*, 397 U.S. 552, 554 (1970). These regulations provide that "*the inclusion in the family, or the presence in the home, of a 'substitute parent'* or *'man-in-the-house' or any individual other than* [*a natural or adoptive parent* or stepparent with a

[24]Neither the Alabama substitute parent rule nor those of other states dealt with a person who even purported to carry out the role of a parent. For example, it was not even necessary that the substitute parent in *King* reside in the home. King v. Smith, 392 U.S. 309, 314 (1968). "The men might meet neither the common sense nor the legal definition of 'parent', but the presumption of their existence could disqualify needy children from public aid. "W. Bell, Aid to Dependent Children, pp. 85-86, 90 (1965). Thus, whether the New York "lodger" assumes a parental role is irrelevant to the issue presented.

[25]42 U.S.C. §602(a)(7) provides that "in determining need" the state shall "take into consideration any income and resources of any child or relative claiming aid to families with dependent children. . . ."

support obligation equivalent to that of a natural or adoptive parent] *is not an acceptable basis* for a finding of ineligibility or *for assuming the availability of income by the State.* In establishing financial eligibility and the *amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered. . . .*" (emphasis added). 45 C.F.R. §233.90(a). Accord, 45 C.F.R. §233.20(a)(3)(ii).[26]

The United States, in an *amicus curiae* brief submitted to this Court in *Lewis v. Martin*, 397 U.S. 552 (1970), stated that 45 C.F.R. §203.1, which is now 45 C.F.R. §233.90(a), clearly prohibited the states from terminating or reducing the AFDC grant solely because a non-legally responsible person resides in the home:

> "[T]he HEW regulations governing State AFDC plans provide that the eligibility of a child for assistance and the *amount of assistance* shall be determined without regard *to the presence in the home of any person other than one having the same obligation of support as a natural or adoptive parent*, except to the extent that a person without such an obligation is shown to be making actual contributions to the support of the child for current use on a regular basis." Brief of the United States as Amicus Curiae in *Lewis v. Martin*, February, 1970, p. 7 (emphasis added).

[26]The present regulations represent a reaffirmation of HEW's earlier rulings. Lewis v. Martin, 397 U.S. 552, 554 (1970). HEW's prior interpretations appeared in Minutes of the Social Security Board, December 17, 1940, Board Document No. 3950-h, pp. 1-3; HEW Handbook of Public Assistance, Part IV, §§3120, 3131(7) and 45 C.F.R. 203.1. The entire text of 45 C.F.R. §233.90(a) appears as an Exhibit to the Brief of Appellants-Respondents.

The validity of 45 C.F.R. §203.1 was unanimously upheld by this Court in *Lewis v. Martin*, 397 U.S. 552 (1970) on the grounds that it is consistent with the rationale of *King*, furthers the purposes of the Social Security Act, and implements 42 U.S.C. §602 (a)(7). The *Lewis* court held that this regulation is designed to protect needy and dependent children by ensuring that they are not denied, or do not receive a *reduced* grant of AFDC assistance because of the presence of *any* person in the home who does not have a legal duty of support equal to that of a natural parent, and who does not in fact make financial contributions to the family.

Indeed, 45 C.F.R. § 233.90(a) and *Lewis* prohibit the states from reducing the AFDC grant even where (a) the person in the home has *some* legal duty of support, but less than the duty of a natural parent,[27] and (b) the person in the home in fact has income. *Lewis v. Martin*, 397 U.S. 552, 556-560 (1970). A person's presence in the home can serve as a basis to terminate or reduce the family's assistance only if this person has an obligation of support equal to that of a natural parent, or, if this person has a lesser obligation of support, to the extent

[27]The man assuming the role of spouse in *Lewis* did have a legal duty of support. Lewis v. Martin, 397 U.S. 552, 553 n. 2 (1970).

that this person makes actual or regular contributions of support.[28] The Court in *Lewis* stated:

> "H.E.W. . . . has apparently concluded that as a matter of current practical realities, the relationship of the MARS to the home is less stable than that of the stepfather . . . and that the likelihood of the MARS' contributing his income to the children—even if legally obligated to do so—is sufficiently uncertain in the absence of the marriage tie, to prevent viewing him as a 'breadwinner' unless the bread is actually set on the table." *Lewis v. Martin, supra* at 559.

New York children who reside in a home in which a "lodger'. is present are even less protected than the children in *Lewis* who resided with a man assuming the role of a spouse or a stepfather since the family's shelter allowance is reduced (a) even though the New York "lodger" is present are even less protected than the to any extent, and (b) even if the "lodger" has no available income or resources.

New York is thus attempting to accomplish by a double presumption that the "lodger" has available income *and* is applying it to the family's shelter expense, what *Lewis* and 45 C.F.R. § 233.90(a) clearly forbid to be done by the one presumption that a person in the

[28]Other cases in which the courts found it impermissible for the states to assume that the available income of a non-legally responsible person is available for the AFDC children include Rodriquez v. Vowell, 472 F.2d 622 (5th Cir.), cert. denied, 412 U.S. 944 (1973); Reyna v. Vowell, 470 F.2d 494 (5th Cir. 1972); Gaither v. Sterrett, 346 F.Supp. 1095 (N.D. Ind.), aff'd, 409 U.S. 1070 (1972); Gilliard v. Craig, 331 F.Supp. 587 (W.D. N.C. 1971), aff'd, 409 U.S. 807 (1972), Solman v. Shapiro, 300 F.Supp. 409 (D. Conn.) (three-judge court), aff'd, 396 U.S. 5 (1969).

home with no parental duty of support will apply his *available* income to meet the family's needs. As the single judge in the *Hurley* action concluded:

> "[T]he regulations here under scrutiny are in one sense far cruder than were those at issue in *Lewis v. Martin, supra*. The California statutes at least took into account the income of the stepfather or MARS in computing the stipend payable to the family. The New York regulations reduce the rental stipend *regardless* of the lodger's income. Hence children who could qualify for a full stipend under the California plan (i.e., if the MARS in fact had no income) would have their rental stipend reduced under the New York scheme." *Hurley v. Van Lare*, 365 F.Supp. 186, 195 (S.D.N.Y. 1973). (A.85) (emphasis in original)

The challenged regulations sharply conflict with and frustrate the holdings and purposes of *King, Lewis* and 45 C.F.R. § 233.90(a). Federal and state courts have thus consistently invalidated regulations identical or similar to the New York lodger regulations. *Roselli v. Affleck*, ___F.2d___, No. 74-1084 (1st Cir., Dec. 31, 1974) (slip opinion, 7-8), *aff'g*, 373 F.Supp. 36, 46-47 (D.R.I. 1973); *Mothers and Childrens Rights Organization v. Stanton*, 371 F.Supp. 298 (N.D. Ind. 1973); *Owens v. Parham*, 350 F.Supp. 598 (N.D. Ga. 1972) (three-judge court); *Hausman v. Department of Institutions and Agencies*, 64 N.J. 203, 314 A.2d 362, *cert denied*, 94 S.Ct. 3083 (1974). See also *Boucher v. Minter*, 349 F.Supp. 1240 (D. Mass. 1972) (three-judge court); *Jenkins v. Georges*, 312 F.Supp. 289 (W.D. Pa. 1969) (three-judge court); *Waits v. Swoap*, 11 Cal. 3d 887, 115 Cal.Rptr. 21, 24-25, 524 P.2d 117, 120-121 (alternative holding), *cert denied*, 95 S.Ct. 499 (1974); *Cooper v. Swoap*, 11 Cal. 3d 856, 115 Cal.Rptr. 1, 9-11, 524 P.2d. 97, 105-107 (1974) (alternative holding), *cert denied*, 95 S.Ct. 498 (1974); *Matter of Battle v. Lavine*, 44 App.Div.2d 307, 354 N.Y.Supp.2d 680 (2d Dept. 1973). Cf. *Randall v. Goldmark*, 495 F.2d 356, 358 (1st Cir.), *cert denied*, 95 S.Ct. 144 (1974).[29]

B. The History, Language, and Operation Of The Challenged Regulations Substantiate That The "Lodger" Regulations Are Based On The Impermissible Assumption That The "Lodger" Is Paying A Pro-rata Share Of The AFDC Family's Rental Expense.

The history of the challenged regulations, their language, their operation and HEW's interpretation of them make it clear that they are based on the impermissible assumptions "that the lodger could, should, and therefore would, pay his or her proper share of the rent. . . ." *Hurley v. Van Lare*, 380 F.Supp. 167, 170 (S.D. and E.D.N.Y. 1974).

Prior versions of the challenged regulations combined elements of both the substitute parent rule in *King* and

[29] In Randall v. Goldmark, 495 F.2d 356, 358 (1st Cir. 1974), the First Circuit stated that the shelter allowance may be reduced "[t]o the extent that such shelter costs are actually reduced by third parties, . . ." The *dictum* to the contrary in Dullea v. Ott, 316 F.Supp. 1273 (D. Mass. 1970) deals only with the validity of the reduction in the grant as a matter of substantive due process. In addition, the "Group II" classification in Massachusetts, discussed in *dictum* in Dullea v. Ott, supra and Boucher v. Minter, supra at 1245 is no longer in operation pursuant to a consent decree in Bower v. Goldmark, D. Mass. No. 74-82-M, Final Decree entered July 9, 1974. The other cases cited by defendants in their Brief, pp. 37-38, stand for the proposition that the needs of the family are not diminished because of the presence in the household of a non-recipient.

the "MARS" rule in *Lewis*, and they have not been changed in any manner that cures their defects.

New York Regulations filed prior to *King* provided that a non-recipient, non-parent relative residing in the household "shall be presumed to be self-maintaining and paying $90 a month for room and board." 18 N.Y.C.R.R. § 353.2(b).[30] Another regulation promulgated in 1965 provided that a non-legally responsible relative living in the home who is willing to have his income applied to the needs of the public assistance family "should be asked to contribute 50 percent of the surplus income to the support of the . . . recipient." 18 N.Y.C.R.R. § 353.3(a). If the non-legally responsible relative or friend was "unwilling to contribute" to this extent, the family's grant was reduced "by an amount equal to the difference between the prevailing commercial rate for room and board and the cost attributable to his living in the home." 18 N.Y.C.R.R. § 353.3(c).

Sections 353.2 and 353.3 were repealed effective June 1, 1970. On this date, section 352.30(c), which is now section 352.30(d), and section 352.31(a)(3), which is now section 352.31(a)(3)(iv), were enacted. Section 352.30(c) "deemed" the non-legally responsible person a "lodger."[31] Section 352.31(a)(3), enacted June 2, 1970,

[30]The prior New York regulations referred to are set forth in Appendix "A" to this Brief. See also A.189-199.

[31]The term "lodger" apparently derives from previous versions of fit mother or suitable home requirements and man in the house rules that existed in some of the states prior to this Court's decision in King v. Smith, 392 U.S. 309 (1968). W. Bell, Aid to Dependent Children 7, 12-13, 85-86, 118 (1965). By the late 1950's "various versions of the 'substitute parent' concept existed in state plans: the 'nonstable, non-legal' union in Arkansas, the 'male boarder' in Michigan, 'Roger the Lodger' in Oregon, the 'unrelated man living in the home' in Alabama. . . ." Id. at 85-86.

shortly after *Lewis* was decided, provided:

> "If a female . . . recipient is continuously cohabiting with a man to whom she is not married, his income and resources shall, if he agrees, be considered in determining the family's eligibility for assistance. If he is not aggreable to such arrangement, his available income and resources shall be applied against his prorated share of the family's shelter needs, . . . and against the needs of the . . . recipient in consideration of her services as a housekeeper."

This provision was in direct conflict with *Lewis*.

Both sections were amended on September 1, 1970 to substantially their present form.[32] While the prior regulations applied only the "lodger's" actual income to the family's needs, the present regulations work a reduction in the grant whether or not the "lodger" has any income or resources. This amendment thus places into operation the double presumption of available income and contribution to replace the single presumption of contribution previously held invalid in *Lewis*.

The language of the challenged regulations substantiates that they operate to presume that the lodger is paying his share of the rent. Section 352.31(a)(3) provides that when the recipient is living with a non-legally responsible person, "The *available income and resources of such person shall be applied* in accordance with the following: . . . (iv) . . . such person shall be treated as a lodger in accordance with subdivision

[32]Section 352.30(c) was renumbered section 352.30(d) on August 26, 1971. (A.73) On April 2, 1973, the reference in section 352.31(a)(3)(iv) to section 352.30(c) was corrected to refer to section 352.30(d). Historical note to 18 N.Y.C.R.R. §352.31.

(d) of section 352.30 of this Part." (emphasis added). Section 352.30(d) provides that "(a) non-legally responsible relative or unrelated person in the household . . . shall be deemed[33] to be a lodger . . . *In the event a lodger does not contribute at least $15 per month, the family's shelter allowance . . . shall be a pro-rata share of the regular shelter allowance.*" (emphasis added). Indeed, defendants acknowledged in the Court of Appeals that the regulations "embod[y] a judgment of the Department of Social Services that, in general, lodgers residing with A.F.D.C. recipients should be required to pay their pro rata share of the housing cost. .,. ." Brief for Appellants Lavine and Van Lare in United States Court of Appeals, December 4, 1973, p. 35. Accord, Defendants' Memorandum of Law in the United States District Court in *Hurley v. Van Lare*, February 23, 1973, p. 22-23 (The regulations leave "the lodger and non-eligible to pay his own way."); Brief in Opposition to Petition for Writ of Certiorari, p. 9.

The operation of the regulations further shows that they are based on the assumption that the "lodger" is paying part of the family's shelter expense. The AFDC family's shelter obligation is fixed by the family's agreement with the landlord. Defendants initially compute the family's shelter allowance based on the shelter needs of the number of eligible persons in the home and their rental obligation. 18 N.Y.C.R.R. § 352.3(a). The AFDC family's shelter needs do not decrease unless the "lodger" pays part of the family's

[33]"Deeming is a familiar legal device to evade applicable requirements by saying that they have been satisfied when they have not in fact been satisfied." New York State Department of Social Services v. Dublino, 413 U.S. 405, 426 (1973) (Marshall & Brennan, J. J. dissenting).

rental expense. Defendants' reduction of the AFDC shelter allowance must thus be based upon the assumption that the "lodger" is in fact paying his share of the rent. *Mothers and Childrens Rights Organization v. Stanton*, 371 F.Supp. 298, 302 (N.D. Ind. 1973); *Owens v. Parham*, 350 F.Supp. 598, 604 (N.D. Ga. 1972); *Hausman v. Department of Institutions and Agencies*, 64 N.J. 204, 314 A.2d 362, 365-366, *cert. denied*, 94 S. Ct. 3083 (1974); *Jenkins v. Georges*, 312 F.Supp. 289, 291-292 (W.D. Pa.) (1969) (three-judge court).[34] This is precisely the presumption of income contribution that is forbidden by *King, Lewis*, and 45 C.F.R. § 233.90(a).

The conclusion that the regulations are based upon an impermissible assumption of income is buttressed by the action taken by HEW when New York's AFDC plan was submitted to it for approval. 42 U.S.C. § 602. The challenged regulations were "marked as not approved" by HEW because

> "The Plans of other states which we looked at did not set an amount of assumed payment–as the N.Y. regulation seems to do–but used a graduated chart

[34]The "fair hearing" decisions contain specific findings by defendants that the "lodger" is not willing to assume responsibility for the support of the family and in fact has made no contribution to the family, or paid part of the rent. (A. 37, 120, 214).

to show how shelter and utility cost were to be pro-rated in a 'mixed household.' "[35]

Thus, the history, language, and operation of the "lodger" regulations, and HEW's action, make it clear that the "lodger" regulations are based on the impermissible assumption that the lodger is paying his share of the rent.

C. The Decision Of The Court of Appeals Is Based On The Erroneous Premise That The AFDC Family's Shelter Needs Are Diminished Solely Because A "Lodger" Resides In The Home.

Judge Hays, writing for the majority of the Court of Appeals, acknowledged "that federal law prohibits a conclusive presumption of support," but found that the challenged regulations are not based on such a presumption but "on the fair inference . . . that the AFDC family actually needs less space for its own use than it is paying rent for." *Taylor v. Lavine*, 497 F.2d

[35]Letters from Catherine M. Miller, Acting Chief, State Plan and Program Characteristics Branch of HEW to plaintiffs' counsel, August 7, 1974 and September 10, 1974, which are set forth in Appendix "B" to this Brief, together with other HEW correspondence concerning the "lodger" regulations. In view of the positions contained in these two letters, which are dated subsequent to the letter of the Regional Commissioner of HEW relied upon by defendants, (A. 155-156) HEW's position is at best ambiguous. See also King v. Smith, 392 U.S. 309, 317 n. 11 (1968). In light of HEW's consistent interpretation of 42 U.S.C. §602(a)(7), and its specific action in marking the challenged regulations "not approved," its "ad hoc" position in the letter relied upon by defendants "cannot stand." See United States v. Leslie Salt Co., 350 U.S. 383, 396 (1956).

1208, 1215 (2d Cir. 1974). (A.167-168). However, in dissenting from the decision of the three-judge district court on the constitutional claims, Judge Hays stated that "it is . . . clear that the New York regulation 'presumes' that a lodger has the will and means to contribute his or her fair share toward housing expenses. . . ." *Hurley v. Van Lare*, 380 F.Supp. 167, 178 (S.D. and E.D.N.Y. 1974). (A.658). If Judge Hays had reached this conclusion in the Court of Appeals, he would have had to conclude that the lodger regulations constitute "a conclusive presumption of support" prohibited by "federal law". *Taylor v. Lavine*, 497 F.2d 1208, 1215 (2d Cir. 1974). (A.167).[36]

The Court of Appeals held that the state can reduce the grant "on the basis of the presence or absence of a lodger in the recipient household" if this method "realistically determines the level of need." *Taylor v. Lavine*, 497 F.2d 1208, 1214-1215 (2d Cir. 1974). (A.167). The Court of Appeals found that "the New York scheme . . . accounts for the actual cost of housing to an AFDC-recipient family." *Taylor v. Lavine*, 497 F.2d 1208, 1216 (2d Cir. 1974). (A.169).

However, the family's shelter needs and costs do not decrease solely because the family allows another person to reside with them. The lodger's presence in the home can only justify the conclusion that the AFDC family's

[36]Whether the presumption is that the 'lodger" is making the payment to the AFDC family or directly to the landlord, the effect is the same. Since the AFDC family must meet its total rental obligation, in either case there is a presumption of a payment made for the benefit of the AFDC family. See Randall v. Goldmark, 495 F.2d 356, 361 (1st Cir.), cert. denied, 95 S. Ct. 144 (1974) (mortgage payment made by estranged husband directly to mortgagee is currently available resource of AFDC family.)

shelter needs and costs have decreased under two circumstances: (a) if the lodger pays part of the rent, in which case the AFDC family's rental cost diminishes by the amount of the payment, or (b) if the lodger's presence reflects the existence of excess space in the AFDC family dwelling. Defendants, however, make no determination whether the family's shelter needs have in fact decreased. A reduction in the grant based upon the assumption that the family's shelter needs have decreased by virtue of the lodger's presence has precisely the same effect as a presumption of the availability of the lodger's income, since needs and income are opposite sides of the same ledger. See *Owens v. Parham*, 350 F.Supp. 598, 604-605 (N.D. Ga. 1972) (three-judge court).[37] Such a reduction violates Congress' intent

> "[f]rom the inception of the Act . . . that the amount of assistance actually paid is based on the amount needed in the *individual* case after other income and resources are considered." *Shea v.*

[37]When substitute parent rules replaced suitable home policies, "[t]he interchangeability of welfare policies [was] exceedingly obvious. . . . In Louisiana the new definition of 'needy child' was challenged successfully, whereupon the material was simply moved over to the section of the state plan entitled 'Deprivation of Parental Support'. . . ." W. Bell, Aid to Dependent Children 85 (1965). Judge Oakes, dissenting in the Court of Appeals, found that "the amount of available living space, like support payments, is an available resource" and that "in place of a presumption of support, the majority substitute a *conclusive presumption that whenever there is a 'lodger' the family has more space than it needs.* As such, it may well be contrary to fact: The older brother may be sharing a single bed with a younger one; the disabled sister may be sleeping on the couch." Taylor v. Lavine, 497 F.2d 1208, 1219 (2d Cir. 1974). (A.176-177). (emphasis in original).

> *Vialpando*, 416 U.S. 251, 94 S.Ct. 1746, 1754 (1974). (Emphasis in original).

To reduce the family's shelter allowance when the "lodger" has not contributed to the family's shelter expense and the family's shelter needs have not changed "means that the cost of living remains the same for the assistance recipients comprising the household, but the benefits received are less and not enough to meet it. Consequently the dependent child—the primary object of the program—suffers." *Hausman v. Department of Institutions and Agencies*, 64 N.J. 203, 314 A.2d 362, 366 (1974), *cert. denied*, 94 S. Ct. 1083 (1974).[38] The inevitable result is that the family will either face eviction or will have to use funds from its basic grant for food and clothing to meet its rental obligation. *Hurley v. Van Lare*, 365 F.Supp. 186, 195 (S.D.N.Y. 1973); *Boucher v. Minter*, 349 F.Supp. 1240, 1245 (D. Mass. 1972) (three-judge court).

It is clear that reductions pursuant to the challenged regulations are not based upon changed shelter needs. Should the AFDC family move to a smaller and less expensive apartment, no matter how small and no matter how low the rent, the shelter allowance will be reduced if the "lodger" continues to reside in this smaller

[38]A reduction in the family's shelter allowance when its shelter needs have not in fact changed also conflicts with HEW regulations prohibiting "inequitable treatment . . . in the light of the provisions and purposes of the public assistance titles or the Social Security Act", 45 C.F.R. §233.10(a)(ii), and requiring "that the determination of need and amount of assistance for all . . . recipients will be made on an objective and equitable basis. . . ," 45 C.F.R. §233.20(a)(i). See Hausman v. Department of Institutions and Agencies, supra; Mothers and Childrens Rights Organization v. Stanton, 371 F. Supp. 298, 303 (N.D. Ind. 1973); Marotti v. White, 342 F. Supp. 823 (D. Conn. 1972) (three-judge court).

apartment.[39] If the lodger leaves the household, the full shelter allowance is restored. These actions are inconsistent with the claim that the reduction in the grant is based on changed housing needs. *Taylor v. Lavine*, 497 F.2d 1208, 1219 n.8 (2d Cir. 1974) (Oakes, J., dissenting). (A.176)

The Court of Appeals found that "it is clear that the New York regulations are based on the fair inference from the presence of the lodger in the household that the AFDC–recipient family actually needs less space for its own use than it is paying rent for." *Taylor v. Lavine*, 497 F.2d 1208, 1215 (2d Cir. 1974). (A.168). Defendants have never, however, claimed this to be the basis for their regulations and have specifically disclaimed it as their basis in this Court. Jurisdictional Statement, p. 23 n.; Application for A Stay Pending Appeal to United States Supreme Court pp. 15-16; *Taylor v. Lavine*, 497 F.2d 1208, 1219 (2d Cir. 1974) (Oakes, J., dissenting). (A.176).[40] Moreover, public assistance recipients generally do not reside in quarters which are larger than

[39]Judge Bauman: "[T]he rental allowance would again be diminished until they moved into a postage stamp. . . ."

Mrs. Gordon (Ass't Att'y General): "If they then say, gee, if we move to a smaller apartment, maybe we will do better, the regulation comes into play again and a share of the smaller apartment is taken away. In that statement, you are absolutely correct, your Honor."

Judge Bauman: "It comes down to one-third of nothing."

Mrs. Gordon: "If they live in a chicken coop it would be a pro-rated share of the chicken coop. . . ." (A.333-334).

[40]Defendants' expert witness, a Senior Program Specialist for the New York State Department of Social Services, (A.257), testified that "you have a set amount of space that you and your family are living in. If someone else comes to live with you, this is not to say that before you had too much space." (A.348).

necessary to meet their needs. Rather, they generally reside in highly overcrowded quarters. (A.246-248, 324, 367, 369-374, 412-413, 456, 471-472, 474-476, 649-650). Since defendants initially compute the shelter grant to meet the shelter needs of the number of eligible persons in the home, 18 N.Y.C.R.R. § 352.3(a), it cannot be said that New York is providing its recipients with more funds than are necessary to meet their housing needs. That the existence of excess space is not the basis for the regulations is made clear by the facts that (a) the full shelter allowance is restored if the lodger moves out, and (b) the grant is reduced even if the family moves to a smaller apartment with a lower rental and the lodger goes with them.

The Court of Appeals also found that the reduction in the grant "accounts for the economies of scale that are realized when individuals live in groups. . . . [Mrs.] Hurley, her three children, and her lodger can live at a lower per capita housing cost than can Hurley and her children alone." *Taylor v. Lavine*, 497 F.2d 1208, 1215 (2d Cir. 1974). (A.168-169). There is no economy of scale, however, solely because another person joins the household; if the lodger does not pay his share of the rent, the total housing cost to the AFDC family remains the same. *Taylor v. Lavine*, 497 F.2d 1208, 1222 (2d Cir. 1974) (Oakes, J., dissenting). (A.182-183). See also, *Hausman v. Department of Institutions and Agencies*, 64 N.J. 203, 314 A.2d 362, 366, *cert. denied*, 94 S.Ct. 3083 (1974); *Mothers and Childrens Rights Organization v. Stanton*, 371 F.Supp. 298, 302 (N.D. Ind. 1973); *Jenkins v. Georges*, 312 F.Supp. 289, 291-292 (W.D. Pa. 1969) (three-judge court).

The concept of an economy of scale applies to variable costs where increased quantity may lead to a lower per

capita cost, because of the lower costs of the incremental units. There can be no economy of scale where the commodity and its costs are, like shelter, fixed.[41] Per capita housing costs can only decrease if the lodger pays his share of the rent. Cf. *Mothers and Childrens Rights Organization v. Stanton*, 371 F.Supp. 298, 302 (N.D. Ind. 1973). Reliance upon an economy of scale theory to support the challenged regulations is thus based on the impermissible assumption that the "lodger" is paying part of the rent. 45 C.F.R. § 233.90; *Taylor v. Lavine*, 497 F.2d 1208, 1222 (2d Cir. 1974) (Oakes, J., dissenting). (A.183).

The Court of Appeals also held that the challenged regulations prevent the use of AFDC funds by non-eligible persons by preventing them "from benefiting from free living space." *Taylor v. Lavine*, 497 F.2d 1208, 1216 (2d Cir. 1974). (A.169). This is refuted by an analysis of defendants' shelter policies and the operation of the challenged regulations. The AFDC family in New York receives a grant based on its total living needs, including shelter. *New York Social Services Law* § 131-a; 18 N.Y.C.R.R. § 352.3(a). Defendants reduce plaintiffs' grant even though the lodger's presence does not result in

[41]The economies of scale are appropriately taken into consideration when the maximum rent schedules are computed. 18 N.Y.C.R.R. §352.3(a). Cf. Mothers and Childrens Rights Organization v. Stanton, 371 F.Supp. 298, 301-302 (N.D. Ind. 1973). In addition, a pro-rata reduction in the shelter grant is inconsistent with the notion of an economy of scale which properly relates to decreased incremental costs. Prior to the decision of the Court of Appeals, defendants did not assert in the courts below that the challenged regulations were justified by an economy of scale, and do not appear to rely on it in this Court.

an increase in the rental expense to the family or the State. Even if the family could find and move into a smaller apartment at a lower rental, if the family chose to allow the "lodger" to reside with them in this smaller apartment, defendants would again reduce the shelter allowance. In sum, the regulations operate against the AFDC family rather than against the lodger,[42] and do not prevent the "lodger" from residing in the home. The lodger is not the recipient of any funds from the State. He

> "is rather the 'beneficiary' of the AFDC family's generosity, and more likely that of the AFDC children's mother. . . . If a lodger . . . is invited into the household, he would not receive any benefit from the AFDC grant, the entire amount of which the family is entitled to without him; he is rather a recipient of that charity which the family wishes to extend *from its own resources*." *Taylor v. Lavine*, 497 F.2d 1208, 1221 (2d Cir. 1974). (Oakes, J., dissenting). (A.180). (emphasis in original).

New York's legitimate interest in preventing its public assistance funds from being expended on behalf of non-eligibles "cannot be accomplished by arbitrary means resulting in unjustified reductions of subsistence to the child." *Hausman v. Department of Institutions and Agencies*, 64 N.J. 203, 314 A.2d 362, 366, *cert. denied*, 94 S. Ct. 3083 (1974). See *King v. Smith*, 392 U.S. 309, 334 (1968).

A reduction in the family's grant solely because the parent choses to allow a "lodger" to reside with the family is inconsistent with the "money payment principle." AFDC assistance is statutorily guaranteed to

[42]Taylor v. Lavine, 497 F.2d 1208, 1222 (2d Cir. 1974) (Oakes, J., dissenting). (A.182)

be in the form of money payments. 42 U.S.C. § 606(b). Under the money payment principle payments must be made "with no restriction imposed by the agency on the use of funds by the individual." 45 C.F.R. § 234.11(a); HEW Handbook of Public Assistance, Part IV §§ 5120, 5132, 5141.[43] This principle is a recognition that public assistance "comes to needy persons as a right." HEW Handbook of Public Assistance, Part IV, § 5120; *Goldberg v. Kelly*, 397 U.S. 254 (1970). The recipient has the right "to decide what use of his assistance check will best serve his interest . . . enjoying the same rights and discharging the same responsibilities as do friends, neighbors, and other members of the community. . . . [A] recipient . . . does not, because he is in need, lose his capacity to select how, when and whether each of his needs is to be met." Handbook of Public Assistance, Part IV, § 5120.[44] Thus, under the money payment principle, the recipient family has the right to allow a relative or

[43]See also, HEW, The Role of Public Welfare in Housing, Report to House Committee on Ways and Means and Senate Finance Committee, p. 174 (1969); Money Payments to Recipients of Old Age Assistance, Aid to Dependent Children and Aid to the Blind, Bureau Circular No. 17, Bureau of Public Assistance (1944); Engleman v. Amos, 404 U.S. 23 (1971); 18 N.Y.C.R.R. §§381.1, 381.2. Exceptions to the money payment principle are permissible where the recipient has "demonstrated such an inability to manage funds that payments to the relative have not been or are not currently used in the best interest of the child," in which case "restricted payments" may be authorized. 45 C.F.R. §234.60(a)(2); 18 N.Y.C.R.R. §381.3.

[44]Former Secretary of HEW, Abraham Ribicoff, has stated that deviations from the money payment principle "are humiliating [and] increase dependence instead of encourage independence. . . ." Hearings on H.R. 10606, 87th Cong. 2d. Sess., p. 138 (1962).

friend to reside with them, for example, "out of familial kindness and generosity. . . ." *Hurley v. Van Lare*, 380 F.Supp. 167, 174 (S.D. and E.D.N.Y. 1974). (A.650).

A reduction in the family's grant solely because the caretaker relative chooses to allow a friend or relative to reside with them violates the meaning and purpose of the money payment principle. The family is penalized for choosing to allow a non-legally responsible person to reside with them in "their own home. . . ." 42 U.S.C. §§ 601, 606(a).[45]

Plaintiffs agree with defendants that the only persons entitled to AFDC assistance are children and caretaker relatives who meet the eligibility requirements of need and dependency, and "essential persons" residing with such eligible individuals. It may be possible for the "lodger" to qualify as an "essential person", 42 U.S.C. §§ 602(a)(7), 606(b)(1), but only the recipient can choose to regard a person as an essential person. *Solman v. Shapiro*, 300 F.Supp. 409, 415 (D. Conn.) (three-judge court), *aff'd per curiam*, 396 U.S. 5 (1969); 45 C.F.R. § 233.20(a)(2)(vi)(b). The effect of the designation of a person as an essential person is that the state must consider that person's needs in computing the recipient family's grant. "The effect of the rule . . . enlarges the eligible individual's budget to comprehend the needs of

[45]The state has a wide array of remedies if funds are being diverted or otherwise not being spent in the child's best interest. See statutes and regulations cited in Taylor v. Lavine, 497 F.2d 1208, 1221 n. 13 (2d Cir. 1974) (Oakes, J., dissenting). (A.180-181). See also Social Security Amendments of 1974, Pub.L. No. 93-647, §§2001-2002; 42 U.S.C. §605; *New York Social Services Law*, §131-a(7), (direct payments to landlord authorized if recipient fails to fully apply amount allowed for shelter for that purpose); 143-b; 143-c; 145; 350-a. See generally, Wyman v. James, 400 U.S. 309, 319 (1971).

the 'essential person' as well as his own." *Solman v. Shapiro, supra* at 415. There is nothing in the federal statute or in its legislative history which indicates that if a person is not designated as an essential person the state can reduce the family's grant because of this person's presence in the home. Cf. *Lopez v. Vowell*, 471 F.2d 690, 694 (5th Cir.), aff'd 411 U.S. 933 (1973); *Lund v. Affleck*, 43 U.S.L.W. 2324 (D.R.I. 1975).[46]

The fact that a "lodger receives benefits and comforts from residing in the public assistance household was not an acceptable basis for terminating or reducing the families' assistance in *King* and *Lewis*,[47] because a reduction on this basis conflicts with the "paramount goal" of protecting and aiding needy and dependent children.[48] Section 233.90(a) specifically prohibits the

[46]In addition, a reduction in the grant pursuant to the challenged regulations operates to penalize the family for not designating the "lodger" an essential person, thereby impinging on their choice of designation under 45 C.F.R. §233.20 (a)(2)(vi)(b).

[47]The man assuming the role of spouse was "in or around the home." Lewis v. Stark, 312 F.Supp. 197, 203 (N.D. Calif. 1968) (three-judge court), rev'd sub nom., Lewis v. Martin, 397 U.S. 552 (1970).

[48]A stepfather residing in the home also receives these benefits and comforts, but the courts, on the basis of 45 C.F.R. §233.90(a), have consistently held that the state cannot assume that his income is available to an AFDC family unless his obligation of support is equal to that of a natural parent. Solman v. Shapiro, 300 F.Supp. 409 (D. Conn.) (three-judge court), aff'd per curiam, 396 U.S. 5 (1969). Accord, Rosen v. Hursh, 464 F.2d 731 (8th Cir. 1972); Gaither v. Sterrett, 346 F.Supp. 1095 (N.D. Ind.) (three-judge court), aff'd, 409 U.S. 1070 (1972); X.v. McCorkle, 333 F.Supp. 1109, 1118 (D.N.J. 1970), aff'd sub nom. Engleman v. Amos, 404 U.S. 23 (1971); Ojeda v. Hackney, 319 F.Supp. 149 (N.D. Tex. 1970); Uhrovick v. Lavine, 43 App.Div.2d 481 (3d Dept.), aff'd, _N.Y.2d_ (1974); Bunting v. Juras, 502 P.2d 607 (Ore. Ct. App. 1972).

states from assuming the availability of income of a non-legally responsible person because of this person's "inclusion in the family, or . . . presence in the home. . . ." New York thus may not reduce the AFDC grant because the "lodger'. derives benefits and comforts from residing with the AFDC family.

In *King v. Smith*, 392 U.S. 309 (1968), this Court recognized that the State has legitimate interests in dealing with immorality, illegitimacy and "in economically allocating its limited AFDC resources. . . ." *King v. Smith, supra*, at 320, 334. The Court stressed, however, that the State may not carry out these interests by denying AFDC assistance designed to meet the needs of needy and dependent children because a non-legally responsible person resides in the home. The Social Security Act and its implementing regulations forbid New York from denying assistance to its needy and dependent children solely because a parent allows a non-legally responsible person to reside in the home. *King v. Smith, supra; Lewis v. Martin*, 397 U.S. 552 (1970).

II.

THE PRO-RATA REDUCTION OF THE SHELTER ALLOWANCE OF A FAMILY RECEIVING PUBLIC ASSISTANCE BECAUSE A NON-LEGALLY RESPONSIBLE PERSON RESIDES WITH THE PUBLIC ASSISTANCE FAMILY CONSTITUTES A CONCLUSIVE PRESUMPTION IN VIOLATION OF THE DUE PROCESS CLAUSE THAT THIS PERSON IS ABLE TO AND DOES PAY PART OF THE FAMILY'S RENTAL EXPENSE.

This Court has held that the Due Process Clause prohibits a state from enacting a statutory or regulatory provision that creates "a presumption which operates to deny a fair opportunity to rebut it. . . ." *Heiner v. Donnan*, 285 U.S. 312, 329 (1932). Accord, *Carrington v. Rash*, 380 U.S. 89 (1965); *Schlesinger v. Wisconsin*, 270 U.S. 230 (1926).

In several recent cases, this Court has held that where important interests are at stake, the state may not conclusively presume facts that are "not necessarily nor universally true in fact", *Vlandis v. Kline*, 412 U.S. 441, 452 (1973), but must provide the private party with a meaningful opportunity to show the actual facts. *Cleveland Board of Education v. La Fleur*, 414 U.S. 632, 94 S.Ct. 791, 798-801 (1974) (public employment); *United States Department of Agriculture v. Murry*, 413 U.S. 508, (1973) (food stamps); *Vlandis v. Kline, supra*, (college tuition benefits); *Stanley v. Illinois*, 405 U.S. 645 (1972) (child custody); *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license). "Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Cleveland Board of Education v. La Fleur*, 94 S.Ct. *supra* at 798, quoting from *Vlandis v. Kline, supra* at 446.

An analysis of these cases reveals that a conclusive presumption of fact violates the Due Process Clause when (a) the presumption adversely affects an interest protected by the Due Process Clause, (b) the legislative scheme purports to be concerned with the subject matter of the presumed fact, (c) the fact presumed is "not necessarily or universally true in fact", and (d) "the State has reasonable alternative means of making

the crucial determination." *Vlandis v. Kline*, 412 U.S. 441, 452 (1973). Each of these elements is clearly present in the instant case.

The interest at stake, public assistance, is "property" within the meaning of the Due Process Clause in the form a "statutory entitlement" that represents the very means to subsist. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). More specifically," [i]n this case the 'property' right in question is the AFDC recipient's statutory entitlement to a shelter allowance commensurate with actual need." *Hurley v. Van Lare*, 380 F.Supp. 167, 175 (S.D. and E.D.N.Y. 1974). (A.652). See 18 N.Y.C.R.R. §352.3(a). The reduction of the family's shelter allowance constitutes a taking of this property interest. This taking is even more apparent and substantial than the takings in *Murry* and *Vlandis*, which involved the denial of *applications* for food stamps and lower tuition benefits. See *Morrisey v. Brewer*, 408 U.S. 471, 482 n. 8 (1972), distinguishing for due process purposes between parole revocation and the denial of parole release.

In each of this Court's recent conclusive presumption cases, the State denied the private party an opportunity to show the actual facts dealing with a subject "the State purported to be concerned with. . . ." *Vlandis v. Kline*, 412 U.S. 441, 446-447 (1973).[49] In *Bell v. Burson*, 402 U.S. 535, 541 (1971), this Court looked "to the operation of the State's statutory scheme" and found that the conclusively presumed fact played a "crucial role" in that scheme.

[49] In *LaFleur* and *Stanley*, the state purported to be concerned with fitness, in *Murry* with need, in *Vlandis* with residency, and in *Bell* with fault. See Bell v. Burson, 402 U.S. 535, 541 (1971), *Vlandis v. Kline, supra* at 446-447. United States Department of Agriculture v. Murry, 413 U.S. 508, 516 (1973) (Stewart, J., concurring).

New York, in carrying out its public assistance program, purports to be concerned with meeting the needs of its indigents. *N.Y. Constitution*, Art. XVII, § 1; *New York Social Services Law* §§131(1), 131-a(1); 18 N.Y.C.R.R. Parts 351 and 352. Indeed, New York purports to meet 100% of its recipients' needs, *N.Y. Social Services Law* § 131-a(1); 18 N.Y.C.R.R. §§ 352.1, 352.2, including their rental obligations and full shelter needs, 18 N.Y.C.R.R. § 352.3. Regular recurring grants are intended to meet the full budget deficit. 18 N.Y.C.R.R. § 352.29.

Fundamental to New York's public assistance scheme in determining a family's eligibility and the amount of assistance to which they are entitled is New York's purported concern with the needs, income and resources of *each* recipient. It investigates in depth the family's actual resources and income. 18 N.Y.C.R.R. §§ 351.2(e), 352.11, 352.12, 352.15, 352.16, 352.17, 352.23, 352.27, 352.28. See generally, *Taylor v. Lavine*, 497 F.2d 1208, 1220 n.11 (2d Cir. 1974) (Oakes, J., dissenting). (A.178-179). In addition, the State is concerned with the resources, income and contributions made by a public assistance family's non-legally responsible friends and relatives. 18 N.Y.C.R.R. §§ 351.2(d)(1), 352.14, 352.31(a)(3)(i)(ii), 369.2(b). The specific challenged regulations themselves are concerned with and purport to constitute an application of the lodger's "available income and resources", 18 N.Y.C.R.R. § 352.31(a)(3), and reflect defendants' "judgment . . . that, in general, lodgers residing with AFDC recipients should pay their pro-rata share of the housing cost. . . ." Brief for Appellants Lavine and Van

Lare, in the United States Court of Appeals for The Second Circuit, dated December 4, 1973, p. 35.[50]

While defendants purport to be concerned with each public assistance family's need, resources and income, and with the lodger's income, resources and payments to the public assistance family, defendants reduce the grant solely because the so-called "lodger" resides in the home, without any consideration of the above factors, and thus without making a determination that the family's shelter needs have in fact decreased.

A person's presence in the home can only diminish a family's shelter needs if (a) this person makes a financial contribution to the family, or (b) this person's presence substantiates the fact that the public assistance family has more space than it needs for its shelter needs. The grant is reduced, however, without a determination of (a) whether or not the "lodger" contributes his share of the rent, or is even able to, (b) whether or not the "lodger's" presence in the home results in an increase in the family's rental expense, and (c) whether or not his or her presence means that the public assistance family has excess space.[51]

[50] See discussion *supra* at pp. 43-44.

[51] In determining whether a statute creates a conclusive presumption, this Court looks to the "actual operation" of the statute to determine whether "the . . . statute enacts what in effect are non-rebuttable presumpsions. . . ." Shapiro v. Thompson, 394 U.S. 618, 631 (1969). The hearing officer at plaintiff Hurley's fair hearing explicitly found that "the man residing with appellant [Mrs. Hurley] was not willing to assume responsibility for the appellant or her children of which he is not the acknowledged or adjudicated father. In addition, no contribution is made by the lodger to the appellant." Hurley v. Van Lare, 365 F.Supp., *supra* at 194. (A.83).

It is thus clear that the challenged regulations on their face and in operation conclusively presume that (1) the lodger has "available income and resources' and (2) he has "applied' them toward the family's shelter expense. 18 N.Y.C.R.R. §352.31(a)(3); *Hurley v. Van Lare*, 380 F.Supp. 167, 178 (S. and E.D.N.Y. 1974) (three-judge court) (A.658) (Judge Hays, dissenting) ("[I]t is thus clear that the New York regulation 'presumes' that a lodger has the will and means to contribute his or her fair share toward housing expenses. . . ."). This double conclusive presumption is "often contrary to fact", *United States Department of Agriculture v. Murry*, 413 U.S. 508, 514 (1973), and violates the Due Process Clause. See *Mothers and Children Rights Organization v. Stanton*, 371 F.Supp. 298 (N.D. Ind. 1973); *Owens v. Parham*, 350 F.Supp. 598, 605 (N.D. Ga. 1972) (three-judge court); *Boucher v. Minter*, 349 F.Supp. 1240, 1244 (D. Mass. 1972) (three-judge court); *Jenkins v. Georges*, 312 F.Supp. 289, 292 (W.D. Pa. 1969) (three-judge court). Cf. *Hoeper v. Tax Commission*, 284 U.S. 206, 215 (1931), where the Court held that a state's imposition of a tax on a husband for his wife's income violated the Due Process Clause because "[t]hat which is not in fact the taxpayer's income cannot be made such by calling it income."

Even if the challenged regulations are viewed as "based on the fair inference from the presence of the lodger in the household that the AFDC–recipient family actually needs less space than it is paying rent for", *Taylor v. Lavine*, 497 F.2d 1208, 1215 (2d Cir. 1974) (A.168), the challenged regulations conclusively

presume, in every case, that the family has excess space.[52]

Under the regulations, defendants reduce the grant without determining what the family's living accommodations are, whether the family has excess space or too little space, and no matter how high or how low the family's rental expense is. The fact patterns of the named parties substantiate that these factors are given no consideration either at state fair hearings or at the local level when the challenged regulations are applied. In sum, what living space the family in fact has, and whether it has excess apce, are irrelevant factors under the challenged regulations.

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[52]Defendants have disclaimed any reliance on the claim that the challenged regulations are related to the amount of the family's space. Jurisdictional Statement, p. 23 fn. In any event, plaintiffs have shown that it is extremely unlikely that public assistance families have excess space or that the regulations are based on this premise. See discussion *supra*, at 50-51. Cases of "doubling-up" and overcrowding have been documented in numerous New York welfare cases. Watts v. Lavine, 75 Misc. 2d 80, 347 N.Y. Supp. 2d 279 (N.Y. Sup. Ct. 1973) (six persons in two bedroom apartment); Jones v. Kurtis, 65 Misc. 2d 856, 319 N.Y. Supp. 2d 557 (N.Y. Sup. Ct. 1971), aff'd, 37 App.Div. 2d 696, 323 N.Y. Supp.2d 671 (2d Dept. 1971); (13 persons in four room apartment). See also Holmes v. Wyman, 40 App.Div.2d 50, 337 N.Y. Supp. 470 (1st Dept. 1972); Davis v. Lavine, 76 Misc. 2d 984, 352 N.Y. Supp. 2d 545 (N.Y. Sup.Ct. 1972) (five persons in two and one half room apartment); Woods v. Lavine, 76 Misc.2d 677, 351 N.Y. Supp. 2d 309 (N.Y. Sup.Ct. 1973) (eight persons in three room apartment); Nicholson v. Schreck, 75 Misc.2d 676, 348 N.Y. Supp.2d 653 (N.Y. Sup.Ct. 1973) (eight persons in two bedroom apartment with two beds); Baumes v. Lavine, 74 Misc.2d 1046, 347 N.Y. Supp.2d 355 (N.Y. Sup.Ct. 1973), rev'd, 44 App.Div.2d 336, 355 N.Y. Supp.2d 477 (3d Dept. 1974) (one child sleeping on floor, another sharing bed with mother).

Whether the "lodger" regulations are based on a presumption of contribution or of excess space, the State is conclusively presuming that the AFDC family's shelter needs have decreased because of the "lodger's" presence. However, neither a conclusive presumption of available income and income contribution nor a conclusive presumption of excess space is "necessarily nor universally true in fact. . . ." *Vlandis v. Kline*, 412 U.S. 441, 452 (1973); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 94 S.Ct. 791, 799 (1974).

There is no basis to assume that in all cases the "lodger" has available income and is applying all or part of it to the family's rental expense. Congress, HEW and this Court have determined that there is no basis for this assumption. 42 U.S.C. §602(a)(7); 45 C.F.R. §233.90(a), *Lewis v. Martin*, 397 U.S. 552 (1970); *King v. Smith*, 392 U.S. 309 (1968). See also *Boucher v. Minter*, 349 F.Supp. 1240, 1244 (D. Mass. 1972) (three-judge court). In the case of every one of the named parties and proposed intervenors, no contribution was made to the public assistance family. The indication in most of these cases was that the "lodger" did not have any available income and resources to make such a contribution. (A.314).

Similarly, there is no basis to assume that in all cases in which a "lodger" resides in a public assistance family's home that the AFDC family has more space than necessary to meet its shelter needs. The evidence concerning the housing accommodations that welfare recipients reside in is to the contrary. See discussion *supra* at 50-51. In addition, such a presumption "may well be contrary to fact: the older brother may be sharing a single bed with a younger one; the disabled sister may be sleeping on the couch." *Taylor v. Lavine*,

497 F.2d 1208, 1219 (2d Cir. 1974) (Oakes, J., dissenting) (A.177).[53]

In *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973), this Court held that a provision of the Food Stamp Act, declaring ineligible all households containing a member who was 18 years old or older and who had been claimed as a tax dependent, created an unconstitutional conclusive presumption that all persons in these households were not needy. As in *Murry*, New York in the instant case is conclusively presuming that the needs of all members of the AFDC household have decreased solely because of the presence of a particular person in the home.

Even where it is very likely that a presumed fact will follow from a given fact, a conclusive presumption of fact violates the Due Process Clause because it deprives the party of an opportunity to show what the actual facts are in the specific case. In *Stanley v. Illinois*, 405 U.S. 645, 654-655 (1972), the Court stated:

> "It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. . . . Given the opportunity to make his case, Stanley may have been seen to be deserving of custody of his offspring."

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[53] In an analogous context, Justice Douglas referred to "desperately poor people with acute problems who, though unrelated, come together for mutual help and assistance . . . , the poorest of the poor [who double up] against the adversities of poverty." United States Department of Agriculture v. Moreno, 413 U.S. 528, 542 (1973) (Douglas, J., concurring).

Accord, *Vlandis v. Kline*, 412 U.S. 441, 447-448 (1973); *Carrington v. Rash*, 380 U.S. 89, 95 (1965).

The State has a "reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised." *Vlandis v. Kline*, 412 U.S. 441, 451-452 (1973). Defendants can serve their objectives by making individualized determinations of income contribution, adequacy of housing space and shelter needs.[54] As the court below held, "the state must make an individualized determination of whether the presence of the lodger does *in fact* diminish the family's shelter needs." *Hurley v. Van Lare*, 380 F.Supp. 167, 175 (S. and E.D.N.Y. 1974) (three-judge court). (A.653).

These questions can be determined at State "fair hearings", which defendants make available in all cases in which the recipient seeks to challenge adverse agency action, including reductions in the grant. 18 N.Y.C.R.R. Part 358. These hearings are provided pursuant to this Court's decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970).

There is nothing unusual or difficult in requiring defendants to make these determinations. See *Dunn v. Blumstein*, 405 U.S. 330, 349-352 (1972). They are factual issues that are appropriate for determination at an administrative hearing. They are the type of factual issues that HEW, 45 C.F.R. §233.90(a), and this Court, *Lewis v. Martin*, 397 U.S. 552 (1970), *Shea v. Vialpando*, 416 U.S. 251 (1974), have determined must

[54]These are the only relevant factors to be considered pursuant to 42 U.S.C. §602(a)(7) and 45 C.F.R. §233.90. The other factors suggested by the majority of the three-judge court, 380 F.Supp. at 170, and the lodger's "means or intent", suggested by the dissent, 380 F.Supp. at 178, are all irrelevant in determining the propriety of a reduction in the grant.

be decided on an individualized basis.[55] The issue of contribution can be resolved by objective evidence which the State can obtain through existing programs of periodic investigation and verification. 18 N.Y.C.R.R. Part 351. Even where the factual issues present difficult problems of proof, this Court has held that an individualized determination must be made to protect the private party's interest. *Carrington v. Rash*, 380 U.S. 89, 96 (1965). See also *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974) (medical fitness); *Vlandis v. Kline*, 412 U.S. 441 (1973) (bona fide residence).

Defendants claim that the presumption can be rebutted if the "lodger" applies for public assistance. However, this does not afford the public assistance recipient, the person against whom the challenged regulations and conclusive presumption operate, an opportunity to rebut the presumption. In every one of this Court's conclusive presumption cases, it was the person who was faced with the deprivation of a protected interest because of the operation of a presumption who was entitled to an opportunity to rebut the presumption.

The public assistance family cannot, of course, compel the lodger to apply for assistance. The evidence substantiates that there are complex reasons why as many as half the persons who are eligible for assistance do not apply for it. (A.287, 298-299); R. O'Neil, The Price of Dependency 253-254 (1970); F. Piven and R. Cloward, Regulating The Poor 165 (Vintage ed. 1972).

[55]The fact that the State makes a hearing available does not cure the due process violation where the State precludes consideration of all relevant issues at the hearing. Bell v. Burson, 402 U.S. 535, 542 (1971).

By reducing the public assistance family's grant solely because a non-legally responsible person resides in the public assistance household, defendants are "using a criterion wholly unrelated to" their objectives of providing a shelter allowance commensurate with the public assistance family's actual shelter obligation and shelter needs, 18 N.Y.C.R.R. § 352.3, and with meeting 100% of the needs of its recipients. *Vlandis v. Kline*, 412 U.S. 441, 449 (1973). Defendants have reduced plaintiffs' shelter allowances despite the fact that their income, resources and shelter needs have remained the same. *Mothers and Children's Rights Organization v. Stanton*, 371 F.Supp. 298, 304 (N.D. Ind. 1973). Thus, as in *United States Department of Agriculture v. Murry*, 413 U.S. 508, 514 (1973), the reduction in the grant "is not a rational measure of need" and, as in *Vlandis v. Kline*, 412 U.S. 441, 449 (1973), "ensures that certain of its bona fide residents . . . do not receive their full subsidy. . . ." A reduction in a family's grant when their needs remain unchanged impedes rather than advances the State's legitimate interests. See *Goss v. Lopez*, 43 U.S.L.W. 4181, 4185 (U.S. Jan. 22, 1975); *Stanley v. Illinois*, 405 U.S. 645, 652 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 265-266 (1970).

While "[p]rocedure by presumption is always cheaper and easier than individualized determination," "the Constitution recognizes higher values than speed

and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656-657 (1972). This Court has consistently held that the administrative burden of making individual determinations does not justify the use of conclusive presumptions. *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974); *Vlandis v. Kline*, 412 U.S. 441, 451 (1973); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Reed v. Reed*, 404 U.S. 71, 76 (1971); *Bell v. Burson*, 401 U.S. 535 (1971). See also, *Goldberg v. Kelly*, 397 U.S. 254, 261, 265-266 (1970).

This Court has held that the state may not conclusively presume unfitness to teach from the fact of pregnancy [*La Fleur*], lack of need for food stamps from tax dependence status [*Murry*], non-residency because of recent arrival [*Vlandis*], parental unfitness because the parent claiming custody is an unwed male [*Stanley*], or unfitness to drive because of involvement in an automobile accident. [*Bell*]. Similarly, New York violates the Due Process Clause by conclusively presuming, solely from a "lodger's" presence, either that the "lodger" is paying his share of the rent or that the family has excess space.

POINT III

A REDUCTION IN A FAMILY'S PUBLIC ASSISTANCE GRANT SOLELY BECAUSE A PARENT ALLOWS A NON-LEGALLY RESPONSIBLE PERSON TO RESIDE IN THE HOME INFRINGES UPON THE RIGHTS OF PRIVACY AND ASSOCIATION AND VIOLATES THE EQUAL PROTECTION CLAUSE.

The challenged regulations create two classes of equally needy public assistance recipients. One class consists of those persons who live in households all of whose members are recipients of public assistance. Persons within this class receive a full sheleter grant under New York's welfare program. 18 N.Y.C.R.R. § 352.3(a). The second class is composed of public assistance recipients who live in households which contain a non-legally responsible friend or relative who is not a recipient of public assistance. The regulations cause a substantial reduction in the shelter allowance of individuals falling within the latter class solely because of the presence of this "lodger" in the household.

Plaintiffs contend that the "lodger" regulations infringe upon their constitutionally guaranteed rights of privacy and association, and that, because the state has not met the burden of demonstrating a compelling governmental interest to justify the infringement of these constitutionally protected rights, the regulations violate the Equal Protection Clause of the Fourteenth Amendment. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 340 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). Plaintiffs submit further that even assuming

that the "compelling interest" test is inapplicable, the regulations still fail to pass constitutional muster under the Equal Protection Clause because they do not rationally further any legitimate governmental objective.

A. The "Lodger" Regulations Infringe Upon The Constitutionally Protected Rights Of Privacy And Association By Penalizing Public Assistance Recipients For Inviting A Friend Or Relative Into The Home

It is well-established that the Constitution guarantees certain areas or zones of privacy. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). The right of privacy has been awarded great importance in our constitutional scheme. As Justice Brandeis stated:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, their right to be let alone–the most comprehensive of rights and the right most valued by civilized man." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion).

In *Stanley v Georgia*, 394 U.S. 557, 564 (1969), this Court, citing Justice Brandeis' dissent, held that "fundamental is the right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy." See also, *Eisenstadt v Baird*, 405 U.S. 438 (1972); *Griswold v Connecticut, supra*. Cf. *NAACP v Alabama*, 357 U.S. 449, 462 (1958).

This Court has repeatedly stated that the very heart of the right of privacy is the right to be free from unwarranted governmental intrusion into one's home. *Stanley v Georgia, supra* at 565. "[O]ver the years, the Court consistently has been most protective of the privacy of the dwelling." *Wyman v James*, 400 U.S. 309, 316 (1971). See also *Eisenstadt v Baird, supra* at 453; *Griswold v Connecticut, supra* at 484; *Boyd v United States*, 116 U.S. 616, 630 (1886).

The right of privacy in the home guarantees individuals the freedom of personal choice in matters of marriage and family life. *Cleveland Board of Education v La Fleur*, 414 U.S. 632, 94 S.Ct. 791, 796 (1974); *Roe v Wade*, 410 U.S. 113, 152-153 (1973); *Eisenstadt v Baird*, 405 U.S. 438 (1972); *Loving v Virginia*, 388 U.S. 1, 12 (1967); *Griswold v Connecticut, supra; Prince v Massachusetts*, 321 U.S. 158, 166 (1944); *Skinner v Oklahoma*, 316 U.S. 535, 541 (1942); *Pierce v Society of Sisters*, 268 U.S. 510 (1925); *Meyer v Nebraska*, 262 U.S. 390 (1923). See generally Note, *On Privacy: Constitutional Protection For Personal Liberty*, 48 N.Y.U.L. Rev. 670, 738-752 (1973). This right protects those who are not married as well as those who are:

> "[I]n Griswold, the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is *the right of the individual, married or single, to be free from unwarranted governmental intrusion* into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v Baird*, 405 U.S. 438, 453 (1972) (emphasis added)

Closely related to the right of privacy in the home is the freedom to associate guaranteed by the First and Fourteenth Amendments. *Bates v City of Little Rock*, 361 U.S. 516, 523 (1960); *NAACP v Alabama*, 357 U.S. 449, 462 (1958). The freedom to associate includes the right to form not only political bonds, but "social, legal and economic" groups as well. *Griswold v Connecticut*, 381 U.S. 479, 483 (1965); NAACP v. Button, 371 U.S. 415, 430 (1963); *Brotherhood of R R Trainmen v Virginia ex rel Virginia State Bar*, 377 U.S. 1 (1964); *Moreno v United State Department of Agriculture*, 345 F.Supp. 310, 315 (D.D.C. 1972) (three-judge court), *aff'd on other grounds*, 413 U.S. 528 (1973). See also *Belle Terre v Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 1544 (1974) (Marshall, J., dissenting) and cases cited therein; *United States Department of Agriculture v Moreno*, 413 U.S. 528, 541 (1973) (Douglas, J., concurring).

Plaintiffs submit that the intertwined rights of privacy and association encompass the freedom of individuals to invite persons who will satisfy their social, "intellectual and emotional needs" to reside in their homes. See *Stanley v Georgia*, 394 U.S. 557,

564-565 (1969); *Belle Terre v Boraas, supra* at 541, (Marshall, J., dissenting); *United States Department of Agriculture v Moreno, supra* at 790, (Douglas, J., concurring).[56]

This Court has held that the Constitution protects the individual's right to possess and use obscene materials in the home, *Stanley v Georgia, supra,* to be safe in the home from unsolicited convassing, *Breard v Alexandria*, 341 U.S. 622 (1951), to be secure in the home from unwarranted police searches, *Mapp v Ohio*, 367 U.S. 643 (1961), and to use contraceptives in the

[56]The instant case stands much closer to Department of Agriculture v. Moreno, *supra*, than to Belle Terre v. Boraas, *supra*. Like *Moreno*, this case involves a challenge to a scheme of dispensing public benefits which penalizes recipients or potential recipients for choosing to reside with unrelated persons. There is no claim here, unlike in *Belle Terre*, that the occupancy of an unrelated person in a recipient's home violates any zoning ordinance or is in any manner unlawful or that the occupancy could be banned on the rationale that it would advance a legitimate governmental objective.

Moreover, the instant regulation, like the *Moreno* statute, is applicable whenever an individual chooses to live with even a single unrelated person. The *Belle Terre* ordinance, on the other hand, was aimed at individuals who choose to live with more than one unrelated person. By distinguishing *Moreno*, the *Belle Terre* court made it clear that it considered the fact that the ordinance did not prohibit two unrelated persons from residing together as crucial. 94 S. Ct. at 1541 n. 6 ("Moreno is therefore inapt as there a household containing anyone unrelated to the rest was denied food stamps.") The classification in *Belle Terre* was "merely legitimate governmental line-drawing." O'Grady v. North Castle, 43 U.S.L.W. 2345, 2346. (S.D.N.Y. Jan. 10, 1975).

In addition, *Belle Terre* involved a challenge to a zoning ordinance, and this Court has always given great deference to the decisions of local authorities concerning land use, as long as such judgments were "fairly debatable." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

home, *Eisenstadt v Baird*, 405 U.S. 438 (1972); *Giswold v Connecticut*, 381 U.S. 479 (1965). See also *United States Department of Agriculture v Moreno*, 413 U.S. 528 (1973); *id.* at 541 (Douglas, J., concurring); *Moreno v Department of Agriculture*, 345 F.Supp. 310 (D.D.C. 1972) (3-judge court), *aff'd* 413 U.S. 528 (1973). These decisions reflect this Court's view that the right to make decisions concerning "the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing" is a fundamental right that is "implicit in the concept of ordered liberty", and is therefore protected by the Fourteenth Amendment. *Paris Adult Theatre I v Slaton*, 413 U.S. 49, 65 (1973). See *Roe v Wade*, 410 U.S. 113, 152 (1973). A mother's decision to allow a friend or relative to reside in her household for companionship, assistance, security or any other reason falls within the zone of privacy and association in the home recognized by this Court.[57]

The right to invite another person to live in one's household is clearly infringed by the challenged regulations. A family's assistance grant is reduced pursuant to the regulations solely because the family chooses to invite a friend or relative into the home. No matter how small the apartment and no matter how

[57]Wyman v. James, 400 U.S. 309 (1971) is not to the contrary. *James* involved the constitutional validity of New York's policy of requiring a home visit by a caseworker as a condition of eligibility. The policy was upheld because the home visit is at "the heart of welfare administration" and serves important rehabilitative and social functions and policy interests. These factors are not present in the instant case. See Rosen v. Hursh, 464 F.2d 731, 735 (8th Cir. 1971), distinguishing *James*. *Wyman* does not hold or suggest that welfare recipients do not have the right to live with a friend or a relative.

low the rent, the grant will be reduced as long as the family allows the "lodger" to remain in the home. As soon as the "lodger" moves out, the full shelter allowance is restored. *Taylor v Lavine*, 497 F.2d 1208, 1219 n. 8 (2d Cir. 1974) (Oakes, J., dissenting). Since the family's rental allowance is reduced even though the lodger's presence may not diminish the family's shelter needs, it is clear that the AFDC family is suffering a penalty solely because it allows a third party to reside with them.

The regulations force a recipient to choose between, on the one hand, exercising his or her rights of privacy and association and thereby forfeiting a portion of the shelter allowance, and, on the other hand, foregoing these basic rights in order to receive a full grant. By forcing this choice upon public assistance recipients, New York is violating the tenet that a state may not penalize persons, directly or indirectly, for exercising their constitutional rights. *Memorial Hospital v Maricopa County*, 415 U.S. 256 (1973); *Shapiro v Thompson*, 394 U.S. 618 (1969); *Sherbert v Verner*, 374 U.S. 403, 404 (1963). See also, *Turley v Lefkowitz*, 414 U.S. 70 (1973); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). Just as a state may not impose a penalty upon the free exercise of religion by denying unemployment insurance benefits to persons who for religious reasons choose not to work on their day of rest, *Sherbert v Verner, supra*, or upon the exercise of the implied constitutional right to travel, in the form of a one year denial of public assistance benefits, *Shapiro v Thompson, supra; Memorial Hospital v Maricopa County, supra*, New York may not reduce a welfare family's grant solely because a parent exercises his or her implicity guaranteed rights of

privacy and association by choosing to invite into the home a friend or a relative.

The penalty imposed upon recipients by enforcement of the regulations is substantial. For example, Mrs. D'Alessio's "lodger" cared for the children during the many occasions that the mother was hospitalized, and, during the periods of the mother's convalescence, ".... took care of her and her children, shopped for food, washed the family's clothes, cooked the family's food, cleaned the house and performed other household tasks." *Hurley v Van Lare*, 380 F.Supp. 167, 171 (S.D. and E.D.N.Y. 1974). The loss of this "lodger" would have caused serious harm to the D'Alessio family. Rather than risk these consequences, Mrs. D'Alessio chose to have her close friend live in her home. As a result of Mrs. D'Allessio's choice, defendants threatened to reduce her family's shelter allowance by $43.60, in spite of the fact that her friend was contributing no financial support to the family, and was unable to make such a contribution. (A.286).[58] The effect of a reduction of $43.60 per month to a family whose total income is $336.00 per month can be staggering. See *Burr v New Rochelle Housing Authority*, 479 F.2d 1165, 1168 (2d Cir. 1973); *Rothstein v Wyman*, 303 F.Supp. 339, 349 (S.D.N.Y. 1969), *vacated and remanded*, 398 U.S. 275 (1970); *Escalera v New York City Housing Authority*, 425 F.2d 853, 864 (2d Cir.), *cert denied*, 400 U.S. 853 (1970).

As one of the plaintiffs' expert witnesses testified before the three-judge court:

[58]Defendants have agreed not to reduce Mrs. D.Alessio's shelter grant pending the outcome of this action. Hurley v. Van Lare, 365 F. Supp. 186, 197 (S.D. N.Y. 1973).

"[A $44 reduction] may make it difficult if one of the children get sick for the family to go to the hospital or to the clinic and you find this quite often that poor people don't have . . . even the thirty-five cents to take them to the clinic or to the welfare office to make an appointment." (A.307).

And, as the lower court concluded in *Hurley v. Van Lare*, 365 F.Supp. 186, 195 (S.D.N.Y. 1973):

"[T]he inevitable result of these regulations is to reduce, perhaps drastically, the stipend for those who are eligible. In the case of a mother with one child, for example, the presence of a non-contributing male lodger would reduce the rental stipend by 33 1/3 percent. This devastating reduction means in practice that rental payments must be met out of the portion of the welfare stipend allotted for food and clothing."[59]

The regulations can cause substantial reductions in a family's grant in a myriad of situations. A reduction can result from the presence in a household of an adult son, as in the Otey[60] and Aloise families, or of a disabled sister, as in the case of the Taylor family, as well as from the presence of a male friend, as in the Clark, Hurley, and D'Alessio households.

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[59]The shelter allowance of proposed-intervenor Aloise and her children was reduced by approximately $53 per month. (A.211-214).

[60]"This is the regulation which requires plaintiff Otey to throw her unemployed 23 year old son out on the street, because if he lives in the home, their shelter allowance will not be sufficient to pay the rent, while if he moves out, the state will pay the full amount." Taylor v. Lavine, 497 F.2d 1208, 1218-1219 (2d Cir. 1974) (Oakes, J., dissenting). (A.175).

If the parent determines that the family cannot subsist with a reduced shelter grant, the parent will be forced to ask the friend or relative to move out of the home, or to refrain from moving in with the family in the first instance. For example, the existence of the regulation has caused plaintiff Hurley to ask one friend to move out of her home, and not to ask another to move in. Defendants concede that but for the pro-ration provisions, Mrs. Hurley would ask a friend to reside with her family. Appellants' Brief, p. 13.[61]

In addition, if the family seeks a contribution from its "lodger", this in itself may cause the lodger to leave the household. One of plaintiffs' expert witnesses, testifying before the three-judge court below, explained that a person "becomes a lodger to serve a variety of functions in the family", that the relationship between men and women is "fragile", and that "if the woman asked him for money, in most cases he doesn't have it, [and] even if he had it, he might say . . . if you put it on that basis, I will just move out. . . ." (A.314).

Enforcement of the challenged regulations thus results in substantial injury to the public assistance family, either by causing a significant reduction in their grant, or by causing them to lose a person who may occupy an important place in the home.

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[61]The regulations thus have the effect of discouraging AFDC mothers from entering into relationships of the type likely to lead to marriage and to end their family dependence upon public assistance. W. Bell, Aid to Dependent Children 99 (1965).

B. The State Has Not Demonstrated A Compelling Interest To Justify Its Infringement Of The Rights Of Privacy And Association

The infringement of plaintiffs' rights of privacy and freedom of association cannot stand unless the state can show both that it is justified by a compelling state interest, see *Roe v. Wade*, 410 U.S. 113, 128 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 447 n. 7 (1972), and that there are no "less restrictive alternatives" of accomplishing the State's purposes. *Cleveland Board of Education v. La Fleur*, 414 U.S. 632, 94 S.Ct. 791-800 (1974); *Shelton v. Tucker*, 364 U.S. 479 (1960). See also *Procunier v. Martinez*, 416 U.S. 396 (1974).

New York has valid interests in ensuring that persons not eligible for public assistance do not receive funds from the State, in determining whether public assistance families receive contributions from their lodgers, 42 U.S.C. §602(a)(7), and in ensuring that public assistance families not reside in overly large quarters. The challenged regulations, however, either fail to further these purposes or do so in an unnecessarily restrictive manner.

The regulations do not prevent the expenditure of funds to persons not eligible for public assistance. The public assistance family's grant is originally computed to meet the statutorily-defined needs of the number of eligible persons in the home. *New York Social Services Law* §131-a; A.526 to A.603. Thus the State expends funds to meet the needs of the recipient unit only. The "lodger" is not the recipient of any funds from the state but is only the beneficiary of the generosity of the public assistance family which allows him to live in their home. *Taylor v. Lavine*, 497 F.2d 1208, 121 (2d

Cir. 1974) (Oakes J., dissenting) (A.179). Moreover, the regulations operate not against the lodger, but against the members of the public assistance family. "[A reduction in] the shelter allowance of an AFDC family by virtue of the presence in the home of a non-paying lodger does not deprive the lodger of any benefits—only the family which allows him to stay can do that—but rather deprives the needy family, and especially the needy child who is the object of the AFDC program, of them." *Taylor v. Lavine*, 497 F.2d 1208, 1222 (2d Cir. 1974) (Oakes, J., dissenting). (A.182). See also *Hurley v. Van Lare*, 365 F.Supp. 186, 195 (S.D.N.Y. 1973). (A.84).

The state's interests in determining whether public assistance families receive contributions from their lodgers or have excess space are also not furthered since grants are reduced pursuant to the challenged regulations whether or not families receive contributions or live in overly large dwellings. These interests can be accomplished by a case by case determination of whether a lodger's presence reduces the shelter needs of a particular family. These determinations can be made at state fair hearings that defendants already make available to all public assistance recipients. 18 N.Y.C.R.R. Part 358. See generally, *Lewis v. Martin*, 397 U.S. 552 (1970); 45 C.F.R. §233.90(a). Individualized determinations of contribution and excess space would not infringe upon plaintiffs' rights of privacy and association, and would carry out defendants' interests.

Plaintiffs agree with the court below that "the constitutionally protected rights of free association and privacy do not compel the states to misallocate their scarce welfare resources" and that the state has an interest in "inquiring whether a lodger's presence in fact

indicates a diminished need for shelter assistance." *Hurley v. Van Lare*, 380 F.Supp. 167, 176 (S.D.N.Y. and E.D.N.Y. 1974). (A.655). However, it is because the state does not *in fact* inquire into whether a lodger's presence reflects a diminished need for shelter assistance that these interests are not furthered. The regulations penalize recipients merely for exercising their right to invite a friend or relative into their household *regardless* of whether or not the lodger's presence reduces the family's needs.

This Court's holding in *Cleveland Board of Education v. Le Fleur*, 414 U.S. 632, 94 S. Ct. 791 791 (1974) is applicable to the instant case. In *Le Fleur*, the Court held unconstitutional across-the-board policies which barred public school teachers from working beyond the fifth and sixth months of their pregnancies on the ground that a conclusive presumption of physical unfitness unduly penalized teachers for exercising their right to bear children protected by the right of privacy. The Court held that where such fundamental rights are affected, the Constitution requires the state "to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty" as does a conclusive presumption. *Cleveland Board of Education v. Le Fleur*, 94 S.Ct. at 799-800. The Court viewed the failure of the school boards to make case by case determinations of fitness as constitutionally fatal.

Similarly, since families who invite friends or relatives into their homes are exercising constitutionally guaranteed rights of privacy and association, state policies which infringe upon these rights must be tailored as narrowly as possible. An across-the-board

shelter grant reduction based upon a conclusive presumption of diminished shelter need does not further New York's interests. As in *Le Fleur*, the state's interest can be reasonably carried out by making individualized determinations.

C. The Lodger Regulations Violate The Equal Protection Clause Even Under The Rational Basis Test

Even if no fundemantal constitutional rights were infringed by the challenged regulations, the "lodger" regulations would still violate the Equal Protection Clause because they are not "rationally based and free from invidious discrimination." *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).[62]

Classifications created by state legislation must either be rationally related to the purposes of the legislation or rationally further some other legitimate governmental interest. *Department of Agriculture v. Moreno*, 413 U.S. 528, 533-534 (1973).

The purpose of the AFDC program is to "furnish financial assistance to needy children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the mainte-

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[62]This Court recently made it clear that its decisions in *Dandridge* and Jefferson v. Hackney, 406 U.S. 535 (1972), do not evince an "intention to suspend the operation of the Equal Protection Clause in the field of social welfare. Regulations must still be rationally based and free from invidious discrimination." Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 1380 (1974).

nance of continuing parental care and protection." 42 U.S.C. §601. Accord, *N.Y. Social Services Law* §350.[63] To carry out these goals, New York has made a determination to meet 100% of a public assistance family's needs. *N.Y. Social Services Law*' §131-a; 18 N.Y.C.R.R. §352.3(a).

The challenged regulations do not further these articulated purposes. On the contrary, a family's capability for maximum self-support and personal independence, and the well-being of the children are impeded by a reduction in the shelter grant when the family's shelter obligation and needs remain constant.

The mere fact that a third person resides with a needy family in no way reduces the needs of the dependent children and their caretaker relative, when the third person in fact contributes no income, pays no portion of the rent, and is under no legal obligation to support the family. Defendants' argument that the family's needs diminish simply because of the presence of the lodger in the dwelling unit ignores the fact that the public assistance unit remains liable for the entire amount of rent provided for in the rental agreement between the assistance unit and the landlord. As Judge Oakes, dissenting from the decision of the Court of Appeals, noted:

> "[P]laintiff Taylor with her eviction notice would surely laugh, although perhaps a little bitterly, at the majority's suggestion that by housing her destitute and disabled sister the family's 'actual cost of housing' was reduced." *Taylor v. Lavine*, 497 F.2d 1208, 1222 (2d Cir. 1974) (A.183).

[63]New York Social Services Law, §350 (McKinney Supp. 1974) provides that the objective of New York's AFDC program is to "enable the father, mother or other relative to bring up the child properly, having regard for the physical, mental and moral well-being of such child. . . ."

To reduce the grant solely because the family chooses to invite a person into their home, when the family's income expenses and needs remain the same, only serves to harm the children. Such a result is clearly antithetical to the purposes of the federal-state AFDC program. See *Smith v. King*, 277 F.Supp. 31 (M.D. Ala. 1967), *aff'd on other grounds sub nom. King v. Smith*, 392 U.S. 309 (1968).[64] Further, New York's failure to analyze on a case by case basis whether and to what extent a family's needs have been reduced as a result of the presence of a "lodger" in the home bears no relation to the fundamental factor of its statutory scheme of meeting 100% of needy childrens' needs.

The instant case is in this respect analogous to *Stanley v. Illinois*, 405 U.S. 645 (1972), where this Court struck down Illinois' irrebutable presumption that all unwed fathers were unfit parents, noting that "the state registers no gain toward its declared goals when it separates children from the custody of fit parents . . . and that [i]ndeed if Stanley is a fit parent, the state spites its own articulated goals when it needlessly separates him from his family." *Id* at 653. See also, *Goldberg v. Kelly*, 397 U.S. 254, 264-265 (1970); *Carrington v. Rash*, 380 U.S. 89 (1965). In order not to spite its own articulated goal of meeting 100% of the needs of its welfare recipients, New York must

[64]Where the third person is a relative of the family, a reduction in the family's grant solely because of this person's presence in the household also undercuts the purpose of the AFDC program of maintaining and strengthening the family structure, 42 U.S.C. §§(a)(13) and (14)(A)(ii), inasmuch as it has the effect of discouraging the relative from continuing to reside in the household. See Taylor v. Lavine, 497 F.2d at 1219 n. 7 (Oakes J. dissenting). (A.175).

determine on a case by case basis whether the presence of a lodger in a particular household has caused a reduction in the family's shelter needs.

In *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), the Supreme Court held that a federal statute denying food stamps to a household solely because it contained one or more unrelated persons was unrelated to the purposes of the Food Stamp Act and thus violated the Equal Protection principles of the Fifth Amendment. The only difference between the instant case and *Moreno* is that while the challenged regulations cause a reduction of assistance when a friend of non-legally responsible relative moves into a recipient family's household, *Moreno* involved a total denial of food stamps to families containing an unrelated person. The rationale and holding of this Court's decision in *Moreno* are applicable to the case herein. See also *King v. Smith*, 392 U.S. 309, 334 (Douglas, J., concurring); *Smith v. King*, 277 F. Supp. 31 (M.D. Ala. 1967) (three-judge court), *aff'd on other grounds sub nom. King v. Smith*, 392 U.S. 309 (1968); *Williams v. Wohlgemuth*, 366 F. Supp. 541 (W.D. Pa. 1973) (three-judge court), *aff'd*, 94 S. Ct. 1604 (1974).

The regulations not only fail to further the articulated goals of New York's public assistance program but they also bear no rational relationship to any other legitimate governmental objective.

Defendants contend that one purpose of the regulation is to encourage recipients to invite "paying lodgers" into their homes, and to thus decrease the amount of assistance paid by the State. In operation, however, the regulations do not yield this result. If a lodger pays less than $15.00, the family's grant is reduced

by a pro-rata share. 18 N.Y.C.R.R. §352.30(d). If the lodger pays more than $15.00, the grant is reduced by the amount of the payment less a $15.00 disregard. 18 N.Y.C.R.R. §352.30(d). However, regardless of whether the lodger pays the public assistance family $15.00 or an amount in excess of $15.00, the family's total income will not increase by more than the fixed sum of $15.00. Therefore, there is no incentive for the family to seek more than $15.00 from their "lodger". And, where the family does receive only $15.00 from the lodger, because the $15.00 is disregarded, the amount of assistance paid by the state remains the same. See *Hurley v. Van Lare*, 380 F.Supp. 167, 176 (S.D. and E.D.N.Y. 1974) (A.653-654).[65]

In addition, the regulations do not prevent non-eligible persons from benefiting from free living space at the expense of the State since the benefit received by the "lodger" flows not from the state but from the generosity of the recipient family. The grants paid by the state are not increased as a result of the presence of lodgers in the homes of public assistance families. The regulations are not directed against the lodger, who may continue to reside in the family's home after the regulations are applied, but against the public assistance

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[65]Defendants do not suggest that the regulations are designed to ensure against overcrowding in the apartments of New York's needy population. Indeed, such a claim would conflict with its contention that one aim of the regulations is to encourage recipients to take "paying lodgers" into their homes. Brief for Appellants and Respondents at 48.

family, which after reduction of its shelter allowance will have to pay part of its rent out of the portion of its grant designed to meet the family's needs for food, clothing and other non-shelter necessaries.

The severe punishment that is meted out under the challenged regulations is felt most strongly by the children of public assistance families despite the fact that the children generally play no role in the decision to invite the lodger into the household. Visiting harm upon the intended beneficiaries of the Social Security Act solely because of the acts of their parents runs afoul of the "basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164,175 (1972). See also *Levy v. Louisiana*, 391 U.S. 68, 72 (1968); *St. Ann v. Palisi*, 495 F. 2d 423 (5th Cir. 1974); *Tyson v. New York City Housing Authority*, 369 F. Supp. 513 (S.D. N.Y. 1974).[66]

The needs of a public assistance child bear no relation to the presence of a "lodger" in his household, unless the "lodger" in fact contributes support to the family, or pays a portion of its rent. New York's decision to ignore the constancy of the child's needs and to arbitrarily reduce the family's assistance merely because the parent chooses to allow a friend or relative to reside in the home thus violates the Equal Protection Clause of the Fourteenth Amendment.

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[66]This principle was recognized by Congress when it approved by implication the Fleming Ruling, which provided that a needy child should not be denied aid "because of the behavior of his parent or other relative." See King v. Smith, 392 U.S. 309, 326 (1965); 42 U.S.C. §604(b).

IV.

EVIDENCE OF ALLEGED GIFTS MADE BY THE LODGER TO THE RECIPIENT PRIOR TO THE TIME THE RECIPIENT'S GRANT WAS REDUCED WAS PROPERLY EXCLUDED BY THE THREE-JUDGE COURT BECAUSE THE ISSUE OF CONTRIBUTION HAD BEEN RESOLVED IN PRIOR PROCEEDINGS BETWEEN THE PARTIES AND WAS IRRELEVANT TO THE SUBJECT MATTER OF THE ACTION.

Defendants contend that the three-judge court erred in excluding evidence of alleged gifts made by plaintiff Hurley's "lodger." These gifts were allegedly made prior to the time the "lodger" resided with Mrs. Hurley, and thus prior to the time period during which defendants reduced the family's shelter allowance pursuant to the challenged regulations.

The issue of alleged contribution by Mrs. Hurley's "lodger" had been resolved in proceedings in this action which occurred prior to the hearing before the three-judge court. In his "Decision After Fair Hearing," defendant Acting Commissioner Van Lare found that "no contribution is made by the lodger to the Appellant." (A.37). In their Statement Pursuant to Rule 9(g) of the Civil Rules for the Southern and Eastern Districts of New York submitted in opposition to plaintiffs' motion for summary judgment on both the statutory and constitutional claims, defendants admitted plaintiff Hurley's sworn statement that "[n]o financial support or contributions were made to me or my

children or on our behalf by male friend. . . ." (A.30,33,38,67).[67]

In addition, the proffered evidence was irrelevant to the subject matter of the action. Only relevant evidence is admissible, i.e., "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Federal Rules of Evidence, Pub.L.No. 93-595, §§401-402. A gift made by a "lodger" prior to the time he or she resides with the recipient family is an irrelevant issue under the challenged regulations. The financial condition of the lodger and his ability to pay part of the rent are also irrelevant factors under the challenged regulations. *Hurley v. Van Lare*, 365 F.Supp. 186, 195 (S.D.N.Y. 1973). (A.85). Moreover, there is no federal or state provision which prohibits a third person from making a gift to a public assistance family.

[67]Rule 9(g) provides in relevant part: "The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement to be served by the opposing party." Defendants' Rule 9(g) Statement admitted all of the allegations in plaintiff Hurley's affidavit and Rule 9(g) statement, with one minor exception which is not relevant to the instant issue. (A.67-68).

HEW Handbook of Public Assistance, Part IV, §3123.[68]

Finally, a showing by defendants that Mrs. Hurley's "lodger" made a gift or gifts to her does not establish the financial situation of lodgers in general or their propensity to make gifts or other contributions.

In sum, the three-judge court properly rejected defendants' offer of proof because the issue had been determined in prior proceedings, and because it was irrelevant to the subject matter of the action.

V.

PLAINTIFFS TAYLOR AND OTEY'S CLAIMS ARE NOT MOOT BECAUSE THE CHALLENGED REGULATIONS HAVE A CONTINUING IMPACT ON THEM AND THEY FACE THE POSSIBILITY OF FUTURE INJURY.

Defendants claim that plaintiff Taylor's claim became moot because her "lodger", i.e., her disabled sister, became eligible for disability benefits, and that plaintiff Otey's claim became moot because her "lodger", i.e., her unemployed adult son, moved out of her home.

Under the circumstances of this case, the three-judge court found that there was no need to determine if the

[68]The disclosure of the recipient's case record and testimony concerning transactions between the recipient and caseworker would in any event violate the recipient's right of confidentiality protected by New York Social Services Law, §136(2). An exception to the confidentiality protection of section 136(2) is information released "by authority of the county, city or town public welfare official, to a person or agency considered entitled to such information." Defendants, who are state officials, made no attempt to show that release of the information was authorized by the *local* officials specified in section 136(2).

individual claims of plaintiffs Taylor and Otey had become moot. Plaintiffs Taylor and Otey were plaintiffs in the *Taylor* action which was consolidated with the *Hurley* action both in the Court of Appeals and before the three-judge court. Plaintiff Hurley's claim has at all times remained justiciable, Jurisdictional Statement, p. 13, thus enabling her to represent the class of approximately 25,000 recipient-families in the consolidated action. (A.203-204).[69] Because plaintiffs Taylor and Otey could not obtain retroactive welfare benefits, *Edelman v. Jordan*, 415 U.S. 651 (1974), there was no relief unique to them that the district court could grant. After the consolidation of the two actions they became in effect members of the plaintiff class and the only relief they could obtain was the injunctive and declaratory relief which ran to all the members of the class in an identical manner. Fed.R.Civ. P., 23(b) (2). There was thus no need to determine whether plaintiff Taylor and Otey's claims were moot.

In addition, this Court has held that even where the claims of the named plaintiffs have become moot, they can continue to represent the other members of a class which has been certified to be a proper class. *Sosna v. Iowa*, 43 U.S.L.W. 4125 (U.S. Jan. 14, 1975); *Richardson v. Ramirez*, 418 U.S. 24 (1974); *DeFunis v. Odegard*, 416 U.S. 312, 317 (1974) (dictum); *Dunn v. Blumstein*, 405 U.S. 330, 333 n. 2 (1972); *Johnson v.*

[69]The action had been certified as a proper class action by the single judge in the *Hurley* action. (A.99). This determination was not disturbed by the Court of Appeals. The action was recertified as a class action by the three-judge court. (A.662). Motions to intervene as party plaintiffs were made as a precautionary measure to insure that the interests of the class were protected. (A.41,56,205).

New York State Education Department, 409 U.S. 75, 76 fn. 7 (1972) (Marshall, J., concurring); Note, *The Mootness Doctrine In The Supreme Court*, 88 Harv.L. Rev. 373 (1974). All of the elements set forth in *Sosna* are present in this case: (a) the action was certified as a class action, (b) the class is adequately represented and the named plaintiffs and the other members of the class do not have any conflicting interests, Fed.R.Civ.P., 23(a) (3), and (c) the nature of the controversy is such that the factual situation of a named plaintiff is likely to change "during the normal time required for resolution of the controversy. . . ." *Sosna v. Iowa*, *supra* at 4127-4129.

Moreover, plaintiffs Taylor and Otey's claims remained justiciable because the challenged regulations have a continuing adverse impact on the relationship between the recipient family and the "lodger." One of the plaintiffs expert witnesses testified that the enforcement of the challenged regulations may force the "lodger" out of the house. (A.314). This was substantiated in the cases of plaintiffs Hurley and Otey. (A.35,229-230,232). Thus, just as the availability of welfare benefits to strikers had an ongoing effect on the relationship between employer and employee, *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 123-124 (1974), a prior reduction and threatened future reduction in the grant pursuant to the challenged regulations has an ongoing effect on the relationship between the recipient-family and its "lodger". See Note, *The Mootness Doctrine In The Supreme Court*, 88 Harv. L. Rev. 373, 379 (1974).

The very nature of the controversy is such that the situation of the parties is subject to constant change,

often because of the enforcement or threatened enforcement of the challenged regulations. Plaintiff Otey's adult son moved in and out of the family's apartment several times. (A.229). The last time he moved out was apparently because of the enforcement of the challenged regulations. (A.229-230). Plaintiff Taylor's disabled sister was first found eligible, then ineligible, and then again eligible for public assistance within a very brief period of time. (A.226,228). The issue is of a recurring nature and to hold any named party's claim moot would render that claim " 'capable of repetition, yet evading review.' " *Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115, 125-127 (1974); *Roe v. Wade,* 410 U.S. 113, 125 (1973); *Dunn v. Blumstein,* 415 U.S. 330, 333 fn. 2 (1972); *Moore v. Ogilvie,* 394 U.S. 814, 816 (1969); *Southern Pacific Terminal Co. v. I.C.C.,* 219 U.S. 498, 515 (1911).

VI.

THE CLASS WAS PROPERLY DEFINED TO INCLUDE ALL THOSE PERSONS WHOSE PUBLIC ASSISTANCE GRANTS WERE REDUCED OR THREATENED WITH REDUCTION SOLELY BECAUSE OF THE PRESENCE OF A "LODGER" IN THE HOME PURSUANT TO THE CHALLENGED REGULATIONS.

Defendants contend that the class is defined improperly because it includes recipients who reside with paying lodgers.

Plaintiffs agree with defendants "that regular and actual contributions to a needy child . . . can be taken

into account . . ." in computing a family's eligibility and the amount of assistance to which they are entitled. *King v. Smith,* 392 U.S. 309, 319 (1968). The class as defined by the three-judge court, particularly when read together with that court's decision, does not purport to include recipients who reside with lodgers in the plaintiff class who *in fact* contribute at least a pro-rata share of the rent.

The class consists of recipients of public assistance who are receiving or are threatened with receiving a reduced grant of public assistance "*solely* because of the presence of a 'lodger' in the home pursuant to 18 N.Y.C.R.R. §§352.31(a)(3)(IV) and 352.30(d);" (A.662). (emphasis added). The use of the word *solely* makes it clear that defendants are not precluded from reducing the grant to the extent that actual contributions made by the "lodger" diminish the family's shelter expense. The three-judge court made this clear when it stated:

> "Before reducing the shelter allowance of a recipient family because the family houses a *non-contributing lodger,* the state must make an individualized determination of whether the presence of the lodger does *in fact* diminish the family's shelter expense." *Hurley v. Van Lare,* 380 F.Supp. 167, 175 (S.D. and E.D.N.Y. 1974). (A.653). (first emphasis added; second emphasis in original).

The class was thus properly defined to include only those recipients whose grants were reduced solely because a "lodger" resided in the home.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the three-judge district court should be affirmed, and that the judgment of the Court of Appeals should be reversed.

February 25, 1975 Respectfully submitted,

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APPENDIX A

THE PREDECESSORS OF NEW YORK'S LODGER REGULATIONS

18 N.Y.C.R.R. §353.2

353.2 Persons included in the budget. (a) For budgetary purposes the agency shall include in its estimate of need and application of income all persons applying for or receiving public assistance and care and living as a unit within the same household.

(b) A relative in the household who is neither the spouse of the recipient nor the parent of a minor recipient and who is not applying for nor receiving public assistance shall not be included in the budget and shall be presumed to be self-maintaining and paying $90 a month for room and board.

(c) A lodger, boarder or boarding-lodger shall not be included in the budget but shall be presumed to pay $65 a month for room and $55 a month for board on a commercial basis.

Historical Note

Sec. amd., filed Aug. 12, 1964; repealed, new added, filed Dec. 23, 1965; amd., filed Apr. 20, 1967 to be eff. immediately. New subds. (b) and (c) substituted.

166.5 SS 5-31-69

18 N.Y.C.R.R. §353.3

353.3 Estimate of need and application of income. [Additional statutory authority: Social Services Law, § 350]

* * *

(c) *For nonlegally responsible relatives.* (1) When a self-maintaining nonlegally responsible relative is a member of the household and when he is willing to have his income verified and applied, his needs and those of his spouse and minor children shall be estimated in accordance with the MILS established by the department. He should be asked to contribute 50 per cent of the surplus income to the support of the applicant or recipient.

(2) When, however, such relative is unwilling to contribute to the extent indicated above, or is unwilling to have his income verified, and when the applicant or recipient lives in the home of such relative, the agency may meet those needs which the relative is unwilling to meet. Ordinarily only those items which entail additional expense to the relative should be included. However, if essential to the maintenance of the home for the recipient, prorated shelter costs or a board and room rate may be allowed. The boarding rate may include payment for exceptional personal services if they cannot otherwise be provided.

(3) When such relative is unwilling to contribute to the extent indicated in paragraph (1), and when the relative lives in the home of the recipient, the

budget deficit of the recipient shall be reduced by an amount equal to the difference between the prevailing commercial rate for room and board and the cost attributable to his living in the home. The provisions of this paragraph shall apply also to a friend living with a recipient.

* * *

Historical Note

Subd. (a) repealed, new added, filed Dec. 23, 1965 to be eff. Dec. 23, 1965.

Subd. (b) amds. filed: Aug. 12, 1964; Sept. 22, 1964; Apr. 23, 1965; Dec. 23, 1965 to be eff. Dec. 23, 1965. New pars. (5) and (6) substituted.

Subd. (c) amds. filed: Sept. 10, 1965; Dec. 23, 1965 to be eff. Dec. 23, 1965. New pars. (2) and (3) substituted.

Subd. (d) amd., filed Dec. 23, 1965 to be eff. Dec. 23, 1965. New par. (1) substituted.

Subd. (e) amd., filed Aug. 12, 1964 to be eff. Aug. 12, 1964. Inserted "dependent" before "person's needs".

Subd. (e), par. (2) amd., filed Aug. 12, 1964 to be eff. Aug. 12, 1964. Substituted "shall" for "may"; deleted "the circumstances * * * case and" before "the amount".

Subd. (f) amd., filed Dec. 23, 1965 to be eff. Dec. 23, 1965. Deleted "as * * * care" after "practicable".

PART 353

Part (§§ 353.1—353.4) repealed, filed June 2, 1970 eff. June 1, 1970.

* * *

353.2 Amd. filed Aug. 12, 1964; repealed, new filed Dec. 23, 1965; amd. filed Apr. 20, 1967; repealed, new filed June 24, 1969; repealed, filed June 2, 1970 eff. June 1, 1970.

353.3 Amds. filed: Aug. 12, 1964; Apr. 23, 1965; Sept. 10, 1965; Dec. 23, 1965; Apr. 20, 1967; July 28, 1967; May 14, 1969; June 24, 1969; repealed, filed June 2, 1970 eff. June 1, 1970.

* * *

18 N.Y.C.R.R. §352.30 (filed June 2, 1970)

352.30 Persons included in the budget.

* * *

(c) A non-legally responsible relative in the household who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income.

Historical Note

Sec. added, filed June 2, 1970 eff. June 1, 1970.

18 N.Y.C.R.R. §352.31(a)(3) (filed June 2, 1970)

352.31 Estimate of need and application of income. (a) *For applicant or recipient.*

* * *

(3) If a female applicant or recipient is continuously cohabiting with a man to whom she is not married, his income or resources shall, if he agrees, be considered in determining the family's eligibility for assistance. If he is not agreeable to such arrangement, his available income and resources shall be applied against his prorated share of the family's shelter needs, against the needs of the minor children of which he is either the acknowledged or adjudicated father and against the needs of the applicant or recipient in consideration of her services as a housekeeper.

* * *

Historical Note

Sec. added, filed June 2, 1970 eff. June 1, 1970.

18 N.Y.C.R.R. §352.30 (As amended September 1, 1970)

352.30 Persons included in the budget.

* * *

(c) A non-legally responsible relative or related person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance.

Historical Note

Sec. added, filed June 2, 1970; amd. filed Sept. 1, 1970 eff. immediately. Substituted new (c).

18 N.Y.C.R.R. §352.31 (As amended September 1, 1970).

352.31 Estimate of need and application of income. (a) *For applicant or recipient.*

* * *

(3) When a female applicant or recipient is living with a man to whom she is not married, other than on an occasional or transient basis, his available income and resources shall be applied in accordance with the following:

(i) When the man is willing to be considered as a spouse, his available income and resources shall be applied in determining eligibility and degree of need.

(ii) When the man is willing to assume responsibility only for his needs, the needs of the woman and those children for whom he is the acknowledged or adjudicated father, his available income or resources shall be applied in determining eligibility and degree of need of such persons only; and assistance for any remaining children shall be provided on a pro rata basis.

(iii) When the man is willing to assume responsibility only for his needs, and the needs of those children for whom he is the acknowledged or adjudicated father, his available income and resources shall be applied in determining eligibility and degree of need of such persons only; and assistance for the woman and remaining children shall be provided on a pro rata basis.

(iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(c).

* * *

Historical Note

Sec. added, filed June 2, 1970 eff. June 1, 1970.

APPENDIX B

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

ASSISTANCE PAYMENTS ADMINISTRATION

August 7, 1974

Mr. Marvin A. Schwartz
Legal Aid Society of Westchester County
56 Grand Street
White Plains, New York 10601

Dear Mr. Schwartz:

Your letter of July 12, 1974, and a copy of your earlier letter of June 6 on the same subject reached this Branch recently from the APA Public Inquiries section. We regret that such a delay has occurred between your inquiry and a reply. Our portion of the delay resulted from a hope that we would find some one who had done the necessary research or who could now do it. But we were not that lucky.

The New York regulations which you cite have idea counterparts in the policies and State Plan provisions of most States relating to their budgeting procedures. These provisions are usually not directed to "the lodger" specifically but to the presence in the same household of non-needy non-AFDC persons. The common budgeting procedure is to allocate to the AFDC family a proportionate share of the cost of shelter and utilities, as allowed by the State, and a share to the non-needy person or persons living there. This action is in line with the "need" concept in determining the amount of the payment; that is, the AFDC-eligible unit does not, in fact, need the entire shelter in which they are living as evidenced by the fact that part of it is used by an additional person or persons. For the AFDC family group, the cost-of-shelter "need" is met in their budget and assistance payment; and the non-needy persons sharing the shelter are responsible for meeting his or their own portion. The staff members who are most familiar with this area of State Plans and practices have the impression that practically all, if not all, States make such modifications.

As you may know, the New York Regulation 18 NY CRR § 352.30 (d) has not been approved by the Region as a part of the State's AFDC Plan. The Plans of other States which we looked at did not set an amount of assumed payment - as the NY regulation seems to do - but used a graduated chart to show how shelter and utility costs were to be prorated in a "mixed" household.

We hope this information is helpful to you. We are sorry that we do not have the staff to research the State Plans more precisely for the budgeting information and no way of identifying State statutes which may require such budgeting procedures.

Sincerely yours,

Catherine M. Miller

Catherine M. Miller
Acting Chief, State Plan &
Program Characteristics Branch

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

ASSISTANCE PAYMENTS
ADMINISTRATION

September 10, 1974

Mr. Marvin A. Schwartz
Legal Aid Society of Westchester County
56 Grand Street
White Plains, New York 10601

Dear Mr. Schwartz:

This letter confirms the information which we gave you by telephone on Friday, September 6, 1974. The call was in reply to your letter of August 20, in which you had asked for further information about New York Regulation 18 NYCRR § 352.30 (d).

The response to your first question is as follows: This section was on the page with other sections of the Regulations which were submitted to the Region II Office of the Social & Rehabilitation Service on September 1972 on Submittal No. 72-35. When the material was sent on to the central office to be filed as part of the State's approved plan for AFDC, this section 352.30 (d) was marked as not approved by the Regional Officer.

The response to the second question is that authority for approval of State Plan amendments has been delegated to the Regional Commissioner for the States within his Region; similarly the decision that a provision is "not approvable" is made by the Regional Commissioner, who usually begins negotiations with the State so it may amend or withdraw the questioned provision.

We would suggest, therefore, that you consult the Regional Commissioner for Region II, Mr. Elmer W. Smith, or the Associate Regional Commissioner for Assistance Payments, Miss Florence Aitchison, for information about why this particular section of the Regulations was considered not approvable two years ago and what its present status is. The address of the Region II office is Federal Building, 26 Federal Plaza, New York, N. Y. 10007. We are sending to Miss Aitchison a copy of the previous correspondence and of this letter so that she may be apprised of your questions.

Sincerely yours,

Catherine M. Miller
State Plan & Program Characteristics
Branch, APA

L AND REHABILITATION SERVICE

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
REGION II
26 FEDERAL PLAZA
NEW YORK, NEW YORK 10007

Mr. Martin Schwartz
Legal Aid Society of White Plains
56 Grand Street
White Plains, New York 10601

Dear Mr. Schwartz:

This is in response to your oral request to Miss Aitchison for copies of correspondence between our Regional Office and the New York State Department of Social Services related to chapter 11, Sections 352.30(d) and 352.31(a)(3)(IV) of the New York State Social Service Department Regulation.

We are enclosing a copy of a letter dated September 21, 1972 from Commissioner Smith to Commissioner Lavine which relates to section 352.30(d). As we reviewed our files we found an apparent oversight in that work materials showed section 352.31(a)(3)(IV) as not approved, but this decision was not reflected in the official action on the plan material.

Sincerely yours,

Florence Aitchison
Associate Regional Commissioner
for Assistance Payments

L AND REHABILITATION SERVICE

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
REGION II
26 FEDERAL PLAZA
NEW YORK, NEW YORK 10007

September 21, 1972

Honorable Abe Lavine
Commissioner
New York State Department of Social Services
1450 Western Avenue
Albany, New York 12203

Re: Submittal 72-35
Codes, Rules & Regulations

Dear Commissioner Lavine:

The captioned subject is accepted for incorporation in your State's Plan with the following exceptions.

Regulation 351.2 (vii) providing that refusal of an applicant or recipient of public assistance to institute proceedings to determine paternity of her child constitutes ineligibility for assistance is not in accord with the Federal proposed amendment to Regulation 233.90.

While it is true this proposal will not be effective until published in the Federal Register, the provisions therein are intended to implement affirmative Supreme Court action in three specific cases. Under these circumstances it does not seem prudent to promulgate Regulation 351.2 (vii) at this time as publication of the amendment is expected shortly.

Regulation 352.30 (d) in the last sentence is unclear in providing that "In the event that a lodger does not contribute at least $15 per month the family's shelter allowance including fuel for heating shall be pro rata share of the regular shelter allowance". This statement is subject to interpretation of budgeting $15. a month as lodger income or whatever lesser amount is in fact paid.

BEST COPY AVAILABLE

As you know, Federal policy, Part 233 requires that only income actually available may be considered.

We therefore, suggest that Regulation 352.30(d) be clarified to assure compliance with the Federal Regulation.

Sincerely yours,

Elmer W. Smith
Regional Commissioner

Supreme Court, U. S.
FILED
MAR 22 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-453

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants,

against

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

No. 74-5054

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR, CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Petitioners,

against

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, JAMES M. SHUART, individually and in his capacity as Commissioner of the Nassau County Department of Social Services, BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, and LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR APPELLANTS IN NO. 74-453 AND FOR RESPONDENTS IN NO. 74-5054

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TABLE OF CONTENTS

	PAGE
Section 352.30(d) is a valid means of assessing the shelter needs of public asistance recipients when they share dwellings with non-paying lodgers. It does not depend on any conclusive presumption in violation of the Social Security Act, related federal regulations or the Due Process Clause of the Constitution	1
The non-paying lodger provision of § 352.30(d) does not violate the recipients' rights to privacy and free association	19
Conclusion	20

Table of Cases

Abramowitz v. *Lavine*, 74 Civ. 1773, E.D.N.Y., commenced December 17, 1974	17
Eisenstadt v. *Baird*, 405 U.S. 438 (1972)	19
Griswold v. *Connecticut*, 381 U.S. 254 (1970)	19
Hausman v. *Department of Institutions and Agencies*, 314 A. 2d 362, cert. denied 94 S. Ct. 3083 (1974)	17
Nero v. *Lavine*, 75 Civ. 1024, S.D.N.Y., commenced March 2, 1975	2, 17
Roe v. *Wade*, 410 U.S. 113 (1973)	19
Roselli v. *Affleck*, 373 F. Supp. 36 (D. R. I. 1973), aff'd —— F. 2d ——, No. 74-1084 (1st Cir. Dec. 31, 1974)	18
Russell v. *Carleson*, 36 Cal. App. 3d 334, 111 Cal. Rptr. 497 (Court of Appeals, 1974)	19
Wyman v. *James*, 400 U.S. 309 (1971)	19

PAGE

STATUTES AND REGULATIONS CITED
FEDERAL STATUTES

42 U.S.C. § 602(a)(24) 12
Housing and Urban Development Act of 1968, Pub. L. 90-448, 82 Stat. 476 (Aug. 1, 1968) 2

STATE STATUTES

Social Services Law § 131-a 9
§ 145 11
§ 358-a 11

FEDERAL REGULATIONS

45 C.F.R. § 233.20 8

STATE REGULATIONS

18 N.Y.C.R.R. § 352.3(a) 3, 5
§ 352.3(c) 3, 5
§ 352.7(f) 8
§ 352.30(d) ..... *passim*
§ 450.3 11

MISCELLANEOUS

B. Bernstein, *Welfare and Income in New York City*, Center for New York City Affairs, New School for Social Research, 1971 ..... 12, 13

Characteristics of AFDC Families in New York State, N.Y.D.S.S., August 1974 7

Findings of the 1973 AFDC Study, Part I. Demographic and Program Characteristics, HEW Pub. No. (SRS) 74-03764, June 1974 13

Guidelines for Development of Consolidated AFDC Assistance Standards, HEW 1974 17

IN THE

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OCTOBER TERM, 1974

No. 74-453

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

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Petitioners,

against

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, JAMES M. SHUART, individually and in his capacity as Commissioner of the Nassau County Department of Social Services, BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, and LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR APPELLANTS IN NO. 74-453 AND FOR RESPONDENTS IN NO. 74-5054

1. Section 352.30(d) is a valid means of assessing the shelter needs of public assistance recipients when they share dwellings with non-paying lodgers. It does not depend on any conclusive presumption in violation of the Social Security Act, related federal regulations or the Due Process Clause of the Constitution.

Appellees acknowledge that shelter is a separate "item of need" in New York and that shelter allowances are computed as separate components of public assistance benefits. Appellees' brief, p. 19; Appellants' main brief, pp. 6-7, 38.* Shelter allowances are payments of variable amounts up to scheduled monthly maximums (themselves subject to exceptions in favor of recipients) which are established on the basis of apartment size and/or assistance group size.** Appellants' main brief, pp. 7-8.

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* These forms of citation refer respectively to the Brief of Appellees in No. 74-453 and for Petitioners in No. 74-5054 and to the Brief for Appellants in No. 74-453 and for Respondents in No. 74-5054. They are used throughout this Reply Brief.

** Appellees erroneously refer to assistance group size as the exclusive basis for determining the shelter allowances to be paid and for establishing the maximums. *E.g.* Appellees' brief, pp. 20, 21, 44. 18 N.Y.C.R.R. § 352.3(a) provides that apartment size (number of rooms) shall be determinative. The local schedules adopt apartment size or assistance group size or both. Appellants' main brief, pp. 7-8; A. 526-603. Appellees' error may have resulted from their belief that the proposed statewide schedule setting forth maximums by assistance family size (A. 522-525) would be in force at the time of this Court's adjudication. See Appellants' main brief, p. 7, second footnote, projecting effective date as April 1, 1975. However, the schedule has been withdrawn effective March 22, 1975 at the request of the New York State Budget Director for further study. The Director's action was predicated, *inter alia*, on his belief that the fiscal implication of the proposed schedule remained unclear. The Director was particularly concerned that the New York City maximums would provide lower shelter allowances for recipients living in certain federally assisted middle income housing resulting in serious impairment of that federal program or the discontinuance of welfare tenancies in those projects. Housing and Urban Development Act of 1968, Pub. L. 90-448, 82 Stat. 476 (Aug. 1, 1968). There is absolutely no warrant in the record for appellees' assumption that the proposed statewide schedule "would substantially increase the shelter allowances provided to recipients." Appellees' brief, p. 20 n. 17. The withdrawal of the schedule is subject to any orders issued in *Nero* v. *Lavine*. 75 Civ. 1024 S.D.N.Y., commenced on March 2, 1975. Therein, plaintiffs seek a preliminary injunction mandating the implementation of the proposed statewide schedule to the extent only that any existing maximums are increased. The return date of the preliminary injunction is March 21, 1975. Plaintiffs in *Nero* are represented by the attorneys for the *Hurley* appellees herein.

The amount of any individual shelter allowance is determined by dividing the number of individuals who in fact share a given dwelling into the total cost of that dwelling. Public assistance shelter payments are then provided for the "compensable" shares, or for the recipients' needs as distinguished from those of the other individuals who also live there, in relation to the actual or maximum allowed rent for the entire dwelling, i.e., the "regular shelter allowance" under § 352.30(d).*

In addition to the specific purposes of preventing public shelter subsidies for lodgers who have not qualified for assistance, conserving public assistance funds for those who are truly needy, and requiring all those who obtain the benefit of such assistance to qualify under uniform standards and bear the same obligations of repayment, § 352.30(d) read with 18 N.Y.C.R.R. §§ 352.3(a) and 352.3(c) reflects the state policy of determining individual shelter needs in light of actual living arrangements with the result that no New York recipient's shelter need can equal the entire cost of the dwelling in which he resides unless he is the exclusive occupant of the dwelling.**

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* Given that the shelter needs of New York recipients are met with individualized, variable amounts up to scheduled maximums (and exceptions thereto), the recipient's shelter cost or shelter allowance cannot be viewed as a percentage of "income." Compare appellees' brief, p. 19 and testimony of Paul Davidoff, A. 323-324. Unlike individuals who do not receive public assistance and who must therefore allocate whatever portion of their income is necessary to meet their shelter needs, the New York welfare recipient receives both a fixed "flat" grant for food, clothing and incidentals and the variable shelter allowance. Thus, the latter allowance may increase (within the maximums and exceptions) depending on changes in living arrangements and/or actual cost without invading the assistance provided for other needs.

** That a recipient may enter into a lease with the landlord does not affect the amount of the shelter allowance he is entitled to receive. Compare appellees' brief, pp. 20, 44, 84. Thus the fact that appellee Taylor had signed a lease establishing the rent on the apartment in which she resided with her minor child and sister,

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When a lodger is added to the dwelling, the shelter needs of the other individuals living there are in fact diminished by this change in circumstance and thus their shelter allowances are properly, proportionately reduced if the individuals are recipients. The change in circumstance and the effect on the shelter needs of the particular recipients involved are established on the basis of investigation of the facts of each case and may be litigated at an adversial hearing if requested by the recipient. Appellants' main brief, pp. 38-41, 53-54, 55-57.*

(*footnote continued from preceding page*)

Virginia Taylor, at $180 per month (A. 226) did not result in appellee receiving an AFDC shelter allowance in that amount for herself alone or for herself and her minor child. Rather, appellee and her child received ⅔ of the $165 Nassau County maximum. While Virginia Taylor was on Home Relief, she received ⅓ of the local maximum even though she was not liable under the lease. When Virginia Taylor's Home Relief was discontinued and she became a non-paying lodger, the same lease was in force. Appellee and her minor child continued to receive the same two-thirds shelter allowance payment because their own needs remained at two-thirds of the allowed rent. Regardless of the lease and regardless of Virginia Taylor's status as a Home Relief recipient or as a lodger, appellee Taylor and her minor child could not "gain" Virginia Taylor's share of the allowed rent by transferring Virginia's shelter need to themselves while she remained in the dwelling. Nor could appellee and her minor child receive the maximum allowed rent for the entirety of a 2-4 room apartment accommodating 1-2 persons, $145 under the Nassau County Schedule (A. 551), since that is not how they in fact lived. Appellees' brief, pp. 8-9 mistakenly refers to appellee Taylor and her minor child as receiving "two-thirds of the maximum allowance for a family of two in Nassau County" and to Virginia Taylor as receiving "one-third of the maximum shelter allowance for a family of three". In fact, the three individuals received pro-rated thirds of $165, the Nassau maximum for an apartment of 3-4 rooms accommodating 3 persons (A. 226, 551).

* See appellees' brief, pp. 5, 33, 48, 66 and n. 54 noting that the assessment of the recipient's shelter need is one of three relevant issues to be heard and determined before shelter allowances are reduced under § 352.30(d) but erroneously contending such determinations are not in fact made under present practice. The

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So long as the lodger continues to live with the recipients, the circumstance which diminished the shelter needs of the recipients and occasioned the pro-ration of the actual or maximum allowed rent in the first instance continues to subsist. This is so regardless of whether the recipients and the lodger choose to move to a smaller dwelling or to

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second relevant issue claimed by appellees, whether or not the lodger contributes, is also determined under present practice and constitutes the basis for distinguishing between the contributing and non-paying ("non-contributing") lodger under § 352.30(d). Appellees' brief, pp. 7-8, 66. The third issue "adequacy of housing space" is relevant to the establishment of shelter allowance maximums [and is in fact considered under § 352.3(a)] and to the maintenance of a suitable home environment for the child (a subject to continuing concern and "home visits" under present practice). Contrary to appellees' suggestion at p. 66, "adequacy of housing space" is not relevant to § 352.30(d). Rather, it is the addition of the lodger to the dwelling which increases the number of shares among which the actual or allowed rent may be divided and thus proportionately diminishes the value of the each preexisting share. The result under § 352.30(d) depends on how many individuals are meeting their shelter needs by living in the dwelling and which of those individual shelter needs are properly compensable with public funds. Notably, the fact that a lodger has joined the dwelling does not require a finding that the recipients and lodger combined need more space than the recipients previously had for themselves even though the combined group could likely obtain such "extra space" if the lodger were prepared to pay an appropriate share of the cost of a larger apartment, e.g., § 352.3(c), or if the lodger became a recipient thereby increasing the public assistance group size and/or the number of rooms for purposes of computing shelter allowance maximums (A. 660 n. 2; Defts. Ex. "B," A. 522-603). Mrs. D'Alessio's case illustrates the fact that the recipient can meet her own shelter needs plus those of the lodger with the same space previously available to the recipient alone. Prior to H.M.'s joining the dwelling, Mrs. D'Alessio used the master bedroom for herself. When H.M. moved in, he shared that bedroom with her (as well as the other rooms in the apartment) (A. 271-272) and thus met his own shelter needs (while those of Mrs. D'Alessio and her minor children continued to be met) with the same amount of space and at the same total rent. The critical difference for public assistance purposes occasioned by H.M.'s joining the dwelling is the addition of another beneficial user whose shelter need does not require a public subsidy.

a larger dwelling albeit the amount that is pro-rated and the resulting shelter allowances will likely decrease or increase depending on which choice is made. See appellees' brief, pp. 22, 30, 50.*

The residence of a non-paying lodger in a dwelling formerly occupied exclusively by recipients necessarily leaves the lodger's share unpaid. This result is entirely consistent with the obligation of the state and local social service districts to meet the shelter needs of qualified AFDC eligibles and only their needs and does not conclusively presume facts in violation of the recipients' rights under the Due Process Clause. Appellants' main brief, pp. 31-32, 32-34, Points I and III. It does not mean, as appellees urge, that the shelter needs of the recipients remain the same as they were before the lodger's arrival* or that the recipients' needs increase when they discover that the lodger will not pay his share either because he tells them he has "no available income" or because he refuses to apply the income he has to the rental "expense". Appellees' brief, pp. 27, 39-40, 62.** It does not mean an

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* That the recipients cannot "gain" the lodger's share by changing their residence is the point of the colloquy between District Judge Bauman and counsel for the appellants (A. 333-335) quoted in part in appellees' brief at p. 50. In addition to the material quoted by appellees, counsel for appellants stated in part (A. 334):

> [T]he point is that the . . . share [ ] which you are taking away reflects that share which belongs to the lodger.
>
> • • •
>
> The point is that there are other devices available to [s]ocial [s]ervices to prevent [w]elfare recipients from [creating overcrowded conditions in order to house a lodger] including taking away the children, and while [s]ocial [s]ervices believe[s] that the family is living in adequate space, it leaves the choice of the meretricious relationship, which you [Judge Bauman] point out, to the [w]elfare recipients. . . . If the man came and applied for assistance, your Honor, and he wanted to live with Mrs. Hurley or Mrs. D'Alessio, the State and the locals would say nothing about it. We don't require them to get married, we want to know that the person who is getting the benefit of a shelter allowance is in fact a needy person, and the only way we can know that is by having him come before us and demonstrating his need.
>
> Once he demonstrates that need, we don't care if he has a common law relationship with Mrs. Hurley, or Mrs. D'Alessio and we don't care if instead of a male [friend] its her son or anyone else.

* Equally, given groups of equal size, the cost to the state and local districts is not the "same" for a public assistance family with a non-paying lodger as it is for a family without a lodger since the lodger is not entitled to and is not paid a public subsidy for his shelter share whereas the recipient is. The point is illustrated by the fact that were the decision of the three-judge district court to be affirmed, appellants estimate that they would be obliged to increase shelter allowance payments by approximately $6.2 million annually. This estimate is for 345,669 AFDC cases and 100,889 Home Relief cases as of December 1, 1974. The additional state and local share for the AFDC cases would be approximately $4,266,000 annually based on 20,030 cases with one or more non-paying lodgers, an average family size of 3.5 increased to 4.75 by the lodger(s), and a shelter share for the lodger(s) valued at $28.42 per month. The additional cost for the Home Relief cases would be approximately $1,968,000 annually based on 4,000 cases with one non-paying lodger, an average family size of 2 increased to 3 by the lodger, and a shelter share for the lodger valued at $41 per month. Estimates of the number of cases with non-paying lodgers, the number of lodgers per dwelling and the valuation of the lodger's shelter share are based on data gathered by N.Y.D.S.S. for *Characteristics of AFDC Families in New York State*, January 1973, published in August 1974, extrapolated for Home Relief cases and updated for the caseload on both programs as of December 1, 1974.

** Appellees' repeated references to the lodger as without any legal obligation to support the public assistance family (e.g., appellees' brief, pp. 5, 20, 25, 33) and as presumptively applying his income to the "family's shelter expense" (e.g., appellees' brief, pp. 27, 39, 62) mistake both the legal obligation and the shelter expense recognized by § 352.30(d). Concededly, the lodger has no legal obligation to support the family. However, he does have a primary legal obligation to support himself. The state and local social services districts may be viewed as having a secondary legal obligation to support the lodger under existing public assistance programs if the lodger seeks their aid and shows that he is unable to provide for himself. The only "expense" that is left uncompensated under § 352.30(d) is the lodger's expense for his own shelter

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"inevitable" or "drastic" reduction in the standard of living for those who are eligible. Appellees' brief, pp. 49, 78. Nor do any other undesirable social consequences necessarily follow. See appellee's brief, p. 15-19, 34-36, 39, 49, 56-57, 76, 78-79, 88.

The existence of the unpaid lodger's share does require the recipients and the lodger to pursue one among several alternatives available to them. First, the lodger may obtain assistance on his own behalf either on the Home Relief program or as an essential person on the AFDC program.* This is obviously the most salutary course of action available to the recipient family and truly needy lodger and is in fact encouraged by § 352.30(d). For example, Michael Otey and Virginia Taylor respectively sought and reapplied for assistance when it became apparent to them that their failure to do so would result in a share of shelter cost

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needs, not the family's expense for their own shelter needs. If one wishes to characterize the lodger, defined by § 352.30(d) as "neither applying for nor receiving public assistance," as presumptively "self-maintaining" or having "available resources" (appellees' brief, pp. 42-45), that presumption is valid. It is the "same 'presumption' that attaches to every member of our society; that he is able to pay his own way until and unless he demonstrates the contrary" (A. 658). It is rebuttable "at the lodger's initiative in the same forum in which the [recipient with whom he resides] was initially required to establish a need for aid" (A. 658).

* Appellees acknowledge the availability of aid for the lodger as an essential person under the AFDC program. Appellees' brief, pp. 13 n. 9, 55-56. While appellees are correct in stating that the essential person must be approved as such by the AFDC caretaker, they fail to point out that the essential person must also be capable of demonstrating his need for aid. 45 C.F.R. § 233.20 (a)(2)(vi); 18 N.Y.C.R.R. § 352.7(f)(i), (ii) and (iv). Appellants' main brief, Ex. "2" p. 15a; appellees' brief, *id.* In view of appellees' contention that the loss of H.M. "would have caused serious harm to the D'Alessio family" (appellees' brief, p. 77), it is difficult to understand why Mrs. D'Alessio would not approve H.M. as an essential person. Appellees' brief, p. 13 n. 9.

remaining unpaid. Indeed, rather than forcing Michael Otey from the home as appellees and the Second Circuit dissent suggest (appellees' brief, p. 76, 78 n. 60, 79), § 352.30(d) provided him with the ready motivation to apply for assistance. Having done so, he obtained the means to support himself either in a dwelling shared with his mother and brother or in his own home. He chose to reside in his own home (A. 229, 30). Upon her restoration to public assistance, Virginia Taylor was provided with the means to make the same choice. She chose to continue residing with appellee Taylor and appellee's minor child. Appellants' main brief, pp. 14-15.

Further, the needy lodger's application for assistance provides advantages for the combined recipient/lodger group. It generally increases the maximum allowed rent for the group (Defts. Ex. "B", A. 522-603; A. 660 n. 2) and enlarges the basic "flat" grant to include the additional former lodger. Social Services Law § 131-a (3), appellants' main brief, Ex. "2" pp. 11a-12a.*

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* As the above illustrations show, Professor Gans' remarks that poor people must "double up because they don't have any other alternative" since "there isn't enough money to go around" or "maintain two households" (A. 310) and must "sacrifice" in terms of the dwelling space available to them in order to help friends and relatives who cannot support themselves (A. 312-313) have no application in New York. See appellees' brief, pp. 15-17. Every New York resident in fact has the "alternative" of obtaining the means to "maintain" a "household" through public assistance. Once he obtains that assistance, he has the choice of maintaining his own household or sharing a dwelling (or all household expenses) with others without requiring a "sacrifice" from anyone. Indeed, it is appellees' position in this action which encourages sacrifices among the poor. Appellees would permanently enjoin the pro-ration provision of § 352.30(d) allowing the lodger to reside with assistance recipients rent free and thus eliminating the motivation presently provided to the needy lodger to obtain his own assistance to pay his share of shelter cost. However, if the lodger is truly destitute (as Mrs. D'Alessio claimed H. M. was), it follows that recipients are not only meeting his

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Second, the lodger may pay his share of shelter cost (as well as meeting his other needs). This is obviously the most salutary course of action for the recipients and lodger to pursue when the lodger is financially capable. It is both fair (A. 658) and mutually beneficial by reason of the operation of the income disregard provisions contained in § 352.30(d).*

The third and fourth alternatives available to the recipients and the lodger are the lodger's leaving the dwelling, resulting in an increase in the shelter needs (and the shelter allowances) of the remaining recipients (appellants' main brief, pp. 39-40, 53-54), or the lodger's continuing to reside in the dwelling, leaving one share of

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shelter needs but meeting his other needs (for food, clothing, etc.) from the flat grants provided only themselves. Thus the D'Alessios are sharing basic "flat" grants for three with a fourth person, the lodger, who is literally eating the caretaker's and children's food. On appellees' view this situation must be permitted to continue at least until the time the local social services district can establish that the children are being neglected and remove them from the home thus terminating the caretaker's eligiblity.

* Although appellees disclaim the relevance of the type of relationship that exists between the recipient and the lodger for the purpose determining the validity of pro-ration (appellees' brief, p. 66), they nonetheless adopt the view of Professor Gans that the relationship between the female caretaker and the male lodger is a "fragile" one which may be impaired or destroyed as a result of § 352.30(d) when the caretaker asks the lodger to meet his own shelter needs. Appellees' brief, pp. 18, 79; A. 314. At the same time, appellees urge that the alleged impairment of the relationships occasioned by § 352.30(d) "discourages AFDC mothers from entering into relationships of the type likely to lead to marriage and to end their family['s] dependence upon public assistance." Appellees' brief, p. 79 n. 61. Appellants find it difficult to comprehend how a relationship between a man and woman that can be destroyed by the woman's request that the man meet is own shelter needs can also result in a marriage between those same individuals that ends the dependence of the woman and her children on public assistance. See also appellants' main brief, pp. 56-58.

the shelter cost unpaid or to be met with the funds provided by recipients' basic "flat" grants. As shown above, neither of these alternatives is the favored, intended, or "inevitable" result of the operation of § 352.30(d).*

There is only one alternative which is foreclosed by the operation of the non-paying lodger provision—the recipients cannot meet the lodger's shelter needs by obtaining the entire rent or the maximum allowed rent from public funds, i.e. they cannot obtain a shelter allowance for the lodger. New York provides recipients with shelter allowances to meet the shelter needs they in fact have, i.e. in proportion to their participation in the dwelling in which they actually reside. Funds are provided exclusively for the recipients' own shelter needs; no additional amount is provided which would permit the recipient to pay for the shelter of another.** The reasons for this are twofold: the recipient's payment for the benefit of the non-paying lodger

* As discussed at pp. 9-10 *ante*, the ultimate civil sanction for the caretaker relative who persists in housing and feeding a lodger with funds provided for her own needs and those of her children is the removal of the children from the home. Social Services Law § 358-a; 18 N.Y.C.R.R. § 450.3. Additional civil "remedies" ranging from counseling to psychiatric aid as well as restrictive payments are also available (A. 180-181 n. 13). The "more drastic alternative" of criminal prosecution is available as well against the caretaker and the lodger. Social Services Law § 145. (Appellants' main brief, Ex. "2" pp. 12a-13a). However, it is apparent that in any given case, the caretaker may be able to support the lodger as well as herself and her children from the public funds provided without seriously jeopardizing the children's interests albeit it is doubtful that she could long pursue this course of action where the lodger in fact paid nothing. To the extent she is able to do so, the state and local districts allow her to make this choice.

** There are two exceptions to this policy. First, on the contributing lodger side of § 352.30(d), funds may be provided equal to the difference between the lodger's payment and the actual cost of his share plus income disregard. Appellants' main brief, pp. 50-51. This

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is necessarily a shelter subsidy for the non-recipient which the state cannot be required to pay; and any such generosity by the recipient is not an extension of charity from his or her *own* resources (appellees' brief p. 53) but an extension of the public's resources to an unintended third party beneficiary.*

Appellees have stated that the following conditions prevail among the poor: the lower one's income, the more likely he is to share his dwelling with lodgers (Brief, pp. 16-17; A. 240-245, 300-303, 307-308); the lower one's income, the more likely he is to live in a crowded dwelling (Brief, pp. 17, 19, 63; A. 246-253, 323); and that as many as half the people who are eligible for assistance do not apply (Brief, p. 67; A. 299).** The relevance of these con-

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provision is unchallenged herein although enjoined by the three-judge court. Appellants' main brief, pp. 69-71. Second, Social Security Act 402(a)(24), 42 U.S.C. § 602(a)(24), and implementing Program Instruction APA-PI-74-8, December 21, 1973, establish an "irrebuttable presumption" that the SSI beneficiary is invisible when he shares shelter with AFDC recipents with the result that the AFDC recipients must receive shelter allowances up to the maximum for their number even if that payment meets the entire rent on the dwelling leaving no shelter cost to be paid by SSI beneficiary, or leaves the SSI beneficiary with less than a full fractional share of the cost. These provisions are not in issue herein.

* As appellees admit, shelter allowances may be used by the recipients only for shelter. Appellees' brief, p. 55 n. 45. They are to be distinguished from flat grants for food, clothing and incidentals with respect to which the recipient has the discretionary choice of allocating the money subject to the protection of the child's interest. Thus the recipient may properly leave a portion of her flat grant on the "collection plate on Sunday" (A. 180 n. 13); she may not leave the "rent money." Appellees cannot fairly argue that earmarking of shelter allowances for shelter violates the "money payment principle" while conceding the validity of federal and state restrictive payment provisions applicable when the "recipient fails to fully apply the amount allowed for shelter for that purpose." Appellees' brief, pp. 53-55.

** According to a study conducted in New York City (where approximately 70% of the welfare cases in the state are concentrated) "only a small reservoir of persons eligible for welfare . . . were not on welfare and these were mainly the aged and unrelated individuals [non-family households]." B. Bernstein,

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ditions to § 352.30(d) which pro-rates the actual or maximum allowed rent for a subsisting dwelling among recipients and non-paying lodgers living there and reduces the shelter allowances payable to the recipients every time another non-paying lodger is added remains unclear. See appellants' main brief, p. 58 noting that one of appellees' expert witness was himself unable to make the connection between § 352.30(d) and vacancy rates,* crowding,** and substandard housing.

Assuming *arguendo* the relevance of appellees' principle contentions that the poorer one is, the more likely he is to share his dwelling with one or more lodgers (or "secondary" or "unrelated" individuals, A. 245, App. 13), and that the poorer one is the more likely his dwelling is to be crowded,*** the evidence offered below failed to prove

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Welfare and Income in New York City, Center for New York City Affairs, New School for Social Research, 1971, p. 32. Among family members, the problem was quite the opposite. Approximately 30,200 family members were receiving assistance who were not eligible. *Id* at p. 23. The data year for the study was 1969. See Professor Gans' testimony, A. 299.

* Accepting *arguendo* the contention that there is an "almost zero vacancy rate for low-rental housing in large parts of New York State. . . ." (appellees' brief, p. 19; A. 319, 321-322, 649), New York AFDC recipients in fact more often. In the 12 months preceding January 1, 1973, 35.4% of New York's AFDC families changed living quarters. The nationwide average for the same period was 40%. In the 12 months preceding January 1, 1972, 16.5% of New York's AFDC families changed living quarters. The nationwide average for the same period was 15%. *Findings of the 1973 AFDC Study, Part I. Demographic and Program Characteristics,* HEW Publication No. (SRS) 74—03764, June 1974, Table 12.

** Indeed, it appears that § 352.30(d) weighs against rather than in favor of "crowding." Since shelter allowances are reduced with each new non-paying lodger, the recipients cannot help but realize that it is to their advantage not to share dwellings with such individuals. In contrast, appellees' view favors "crowding" since no reduction in the allowances would occur upon the addition of the non-paying lodger thus eliminating any financial inhibition the recipients have about taking in such lodgers while encouraging lodgers to share dwellings with recipients since the lodgers would be able to live there rent free.

*** These two contentions have not been previously opposed by appellants in this Court.

that the contentions were in fact true. Appellees' brief, pp. 16, 17, 19, 63; A. 240-245, 246-253, 300-303, 307-308, 323.

The contention that the poorer one is, the more likely he is to live with one or more lodgers relies principally on the affidavit of Susan E. Smith (A. 240-242) with annexed table (A. 243) and allegedly supporting census data (A. 245).* Ms. Smith states in part (A. 241):

> This table [A. 243] clearly shows that, in general, those groups of heads of households with the lowest median income (White, Black and Puerto Rican females) and, similarly, the largest percentage of persons living on income below the poverty level, are considerably more likely to house one or more persons besides their immediate families living within their households than those in the higher income groups.

Ms. Smith's thesis is opposed at least in part by her own table which shows that White female heads of households with the highest median income (among female heads of households), $4,507 per annum, have the same number of households with lodgers (approximately 8%) as do Puerto Rican female heads of households with the lowest median income (among female heads of households), $3,109 per annum. Moreover, Ms. Smith has either misread the census data (A. 245) allegedly used to support the bar graph on the table (A. 243) (or used additional data which she did not provide to the court). Neither census Table 153 or 207 (A. 245) provides any indication of the sex or marital status of the head of the household in which the "lodger or partner" resides. Thus it is impossible to create the categories (White male, White female, etc.) Ms. Smith shows as heads of households at the base of the bar graph and equally impossible to assign any particular number of

* Ms. Smith's graph is considered at length by Professor Gans (A. 300-302, 307-308). Professor Gans agreed with Ms. Smith's views (A. 307-308).

"lodgers or partners" to those categories from the information provided.*

The contention that the poorer one is, the more likely he is to live in a crowded dwelling relies principally on the affidavit of Gary W. Bickel (A. 246-248), the annexed table (A. 249) and graph (A. 251) and supporting census data (A. 253). Mr. Bickel's table and graph are correct insofar as the information provided therein.**

Mr. Bickel adopts the thesis that the less money a person or family has, the more crowded his dwelling is likely to be (A. 247-248). He largely omits from consideration rental units below $80 monthly because "these are generally single person units" which cannot be crowded by definition since they consist of at least one room and cannot be separated from the 'grouped data". He states further that if the multi-person units below $80 monthly could be separated from the single person units, his thesis would be reenforced (A. 247 and n. 1). This statement is false. Multi-person units below $80 monthly rentals can be separated from single person units, and the data so derived shows that multi-person units at the lower levels do not become more crowded, they become less crowded. The data omitted by Mr. Bickel has been derived from

* Ms. Smith's error appears to arise from a misreading of Table 153 (A. 245). Taking of the first category, "White male" and reading across the first line of figures, we find that there are 98,010 "lodger[s] or partner[s]" in New York State. Ms. Smith apparently believes that the figure (and the parallel figures for "White female," "Negro male," etc. appearing on Table 153) represents the number of lodger-partners living with White male heads of households. It does not. Rather, it represents the number of White male lodger-partners in New York. As shown by facts of the Hurley and D'Alessio claims, it cannot be assumed that all White male lodgers live with White male heads of households.

** Mr. Bickel's use of irregular intervals on the horizontal axis of his graph (A. 251) gives a distorted appearance to the relationship between median income (horizontal axis) and percentage of renter households (vertical axis) (A. 251).

census Table A-2 (A. 253)* and graphed by appellants together with the information provided by Mr. Bickel. The graphs appear as Exhibits "1" and "2" to this Reply brief.**

Appellees' characterization of the existing New York shelter allowance program as providing "one shelter allowance" for the "number of persons in the household who are eligible for public assistance" without regard to whether or not the beneficial use of the dwelling is shared and without regard to the actual cost or maximum allowed rent for the dwelling involved is error (appellees' brief, p. 20) and reveals that their purpose in these actions is not to insure that the individual shelter needs of public assistance recipients are met but to convert the existing

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* That the data for multi-person units below $80 monthly rentals can be derived from census Table A-2 (A. 253) is illustrated by the following example: Looking at the 5th vertical column on the census table, $70-79 monthly rental, and proceeding down the column, we find that the total number of such units is 199,356 and that the number of single person units in that category is 76,178. Subtracting the single person units from the total, we find that there are 123,178 multi-person units in the $70-79 category. Continuing down the 5th column, we find that the number of crowded units (1.01-1.50 persons per room) with plumbing in the category is 15,762, and the number of such "crowded units" without plumbing is 307, making a total 16,069 crowded multi-person units at $70-79 monthly, or 13% of total number of multi-person units in that category. There are 5,568 "very crowded" multi-person units (1.51 or more persons per room), or 4.5% of the total number of $70-79 multi-person units. The same procedure can be followed for the 2nd (less than $50 monthly), 3rd ($50-$59 monthly) and 4th ($60-$69 monthly) vertical columns, and the results graphed as set forth in Exhibits "1" and "2" hereto.

** Appellants regraphed the Bickel data with regular intervals on the horizontal axis to avoid distortion and with "multi-person units" rather than "renter households" on the vertical axis since, as Mr. Bickel concedes, the grouping of single person units with multi-person units into "renter households" has a "masking effect" on crowding (A. 247). Appellants have also graphed the amount of rent (in addition median income) in relation to multi-person units. Exhibit "2."

program into one providing flat shelter grants.* They cite no federal authority in support of their position, and indeed, there is none. HEW permits but does not mandate such grants, and continues to recognize pro-ration of shelter costs as a means of assessing individual shelter needs. See *Guidelines of Development of Consolidated AFDC Assistance Standards, id.*, providing instructions on "fair averaging" for flat grants and noting that states that change to flat grants are, *inter alia*, " 'averaging away' differences caused by . . . prorating of shelter costs between recipients and non-recipients in a household" (p. i-1), thereby admitting that pro-ration of shelter cost remains a valid means of assessing needs in states like New York which do not have "flat" all purpose grants or "flat" shelter grants. Compare *Hausman* v. *Department of Institutions and Agencies*, 314 A. 2d 362, cert. denied 94 S. Ct. 3083

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* As illustrated by the combination of their claims in these actions with their demand for preliminary injunctive relief in *Nero* v. *Lavine, supra*, appellees appear to desire flat grants at the per person or assistance family maximums. See p. 17, *ante*. This is wholly inappropriate. Maximums operate under programs where varying amounts are payable up to a ceiling. While it is true that under such a program, any recipient may obtain the maximum if he can show a need for it, it is equally true that not all the recipients obtain the maximum. Under a flat grant system, the amount of the flat grant is fixed at the "fair average" of the payments in a defined category, never at the maximum in the category. Under such a system, no recipient can obtain the maximum even if he needs it, or obtained it under a prior, variable ssytem. See *Guidelines for Development of Consolidated AFDC Assistance Standards*, HEW 1974. That the fair averaging method employed in flat grants tends to disadvantage more (approximately half) of the caseload than a variable system with maximums (which generally disadvantages no more than 5% of the caseload) is recognized in *Abramowitz* v. *Lavine*, 74 Civ. 1773, E.D.N.Y., commenced on December 17, 1974, wherein SSI beneficiaries in effect seek to return to or additional eligibility for state assistance contending in part that the basic "flat" grant for food, clothing and incidentals plus the variable shelter allowance would provide them with more funds than they receive under SSI.

(1974); *Roselli* v. *Affleck,* 373 F. Supp. 36 (D.R.I. 1973), aff'd —— F.2d ——, No.74-1084 (1st Cir. Dec. 31, 1974).*

* Appellees' position that HEW has disapproved the non-paying lodger provision of § 352.30(d) or remains equivocal about its validity is frivolous. Appellees' brief, pp. 45-46, 1b-6b. Although it appears that Commissioner Smith's position on § 352.30(d) was somewhat unclear on September 21, 1972 (appellees' brief pp. 5b-6b), it is plain that the same Commissioner Smith specifically approved the same regulation on January 15, 1974 (A. 155-156, 622-623). Miss Catherine Miller's comments (appellees' brief pp. 45-46, 1b-3b), added by counsel for appellees after the record below was closed, show only that some states whose regulations were approved computed the lodger's shelter share on the basis of a scheduled or assumed value whereas the New York regulation computed it on the basis of his fractional share of actual cost.

2. The non-paying lodger provision of § 352.30(d) does not violate the recipients' rights to privacy and free association.

As every court that has heard these actions has recognized, § 352.30(d) does not prescribe familial life styles, sexual habits or any other matter which this Court has found to come within protected zones of privacy and free association. See e.g., *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972); *Roe* v. *Wade,* 410 U.S. 113 (1973); *Griswold* v. *Connecticut,* 381 U.S. 254 (1970).

Since recipients are entitled to no more than their own shares of shelter, the non-paying lodger provision of § 352.30(d) properly determines whether a non-recipient is sharing a dwelling with a recipient and the amount of his share of shelter cost. It does not prevent the recipient from sharing the dwelling with a lodger, it simply prevents the recipient from charging the cost of her choice to public funds, and "nothing of a constitutional magnitude is involved." *Wyman* v. *James,* 400 U.S. 309, 324 (1971).

Even if appellees' view is accepted and a strict equal protection test is applied, the non-paying lodger provision of § 352.30(d) achieves a "perfect congruence" with the legitimate state interests involved in the payment of public assistance funds only to meet the needs of qualified recipients by necessary and "least drastic" means. Appellants' main brief, pp. 53-54, 60. Compare *Russell* v. *Carleson,* 36 Cal. App. 3d 334, 111 Cal. Rptr. 497 (Court of Appeals 1974), sustaining the application of criminal penalties when the lodger fails to pay his share.

CONCLUSION

For the foregoing reasons and those set forth in appellants' main brief, the judgment and order of the District Court in No. 74—543 should be reversed and the decision of the Second Circuit in No. 74—5054 should be affirmed. Alternatively, the judgment and order of the District Court in No. 74—453 should be vacated and the cause remanded to the District Court for further proceedings.

Dated: New York, N.Y., March 21, 1975.

Respectfully submitted,

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• The Attorney General gratefully acknowledges the co-operation of Kenneth L. Siegal in the preparation of the ststistical analyses presented herein.

EXHIBIT "1"

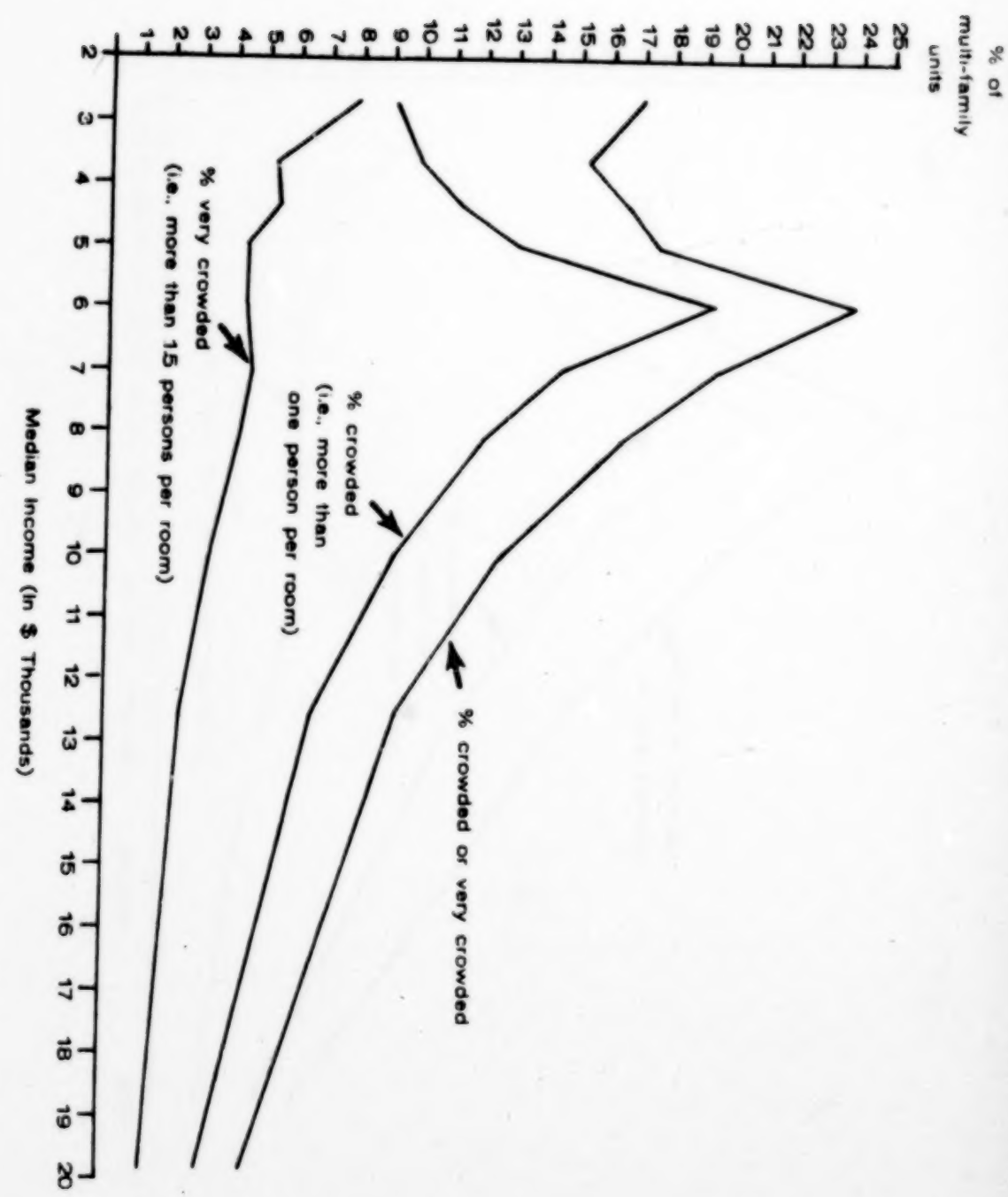
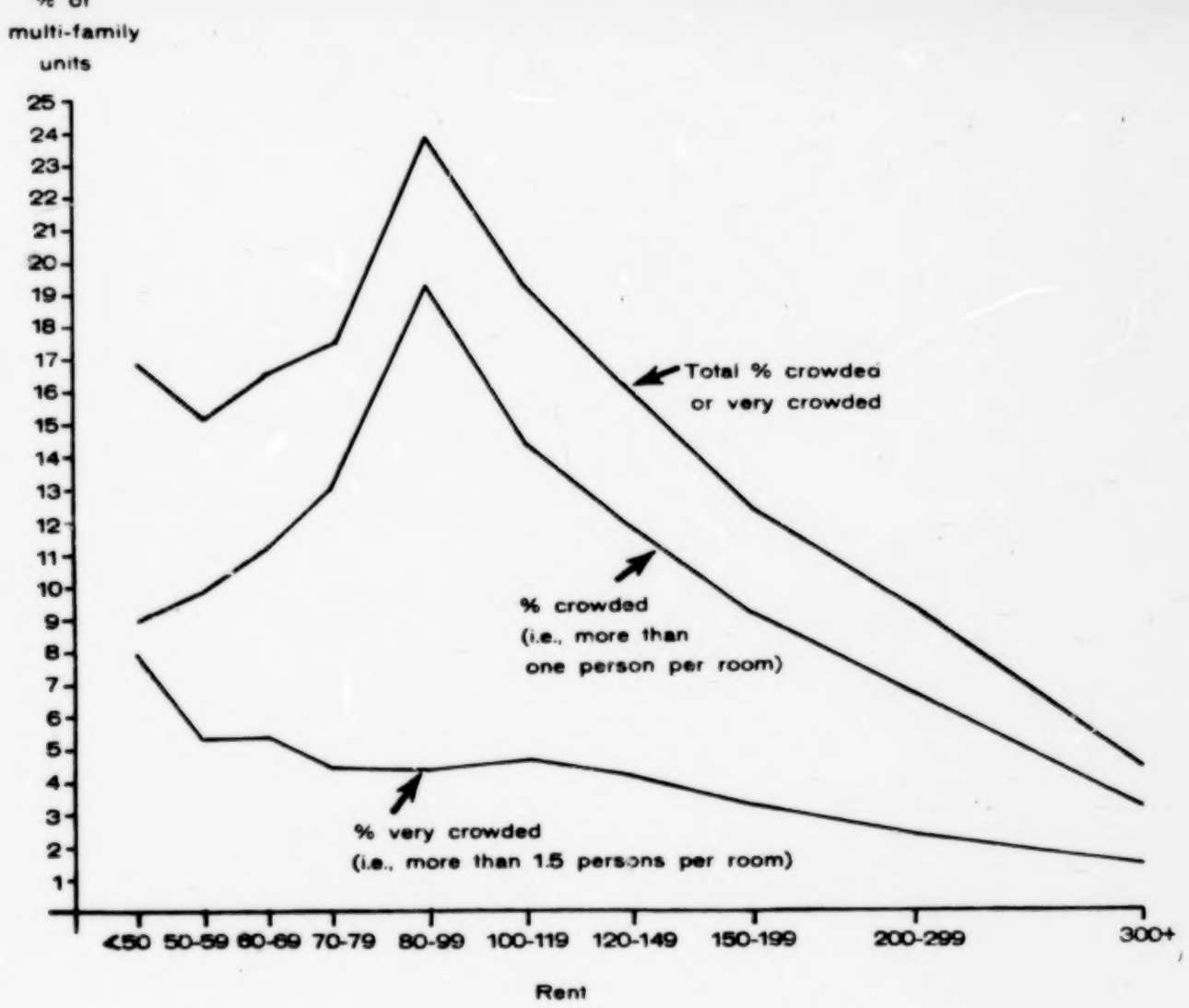


EXHIBIT "2"


% of
multi-family
units
25
24
23
22
21
20
19
18
17
16
15
14
13
12
11
10
9
8
7
6
5
4
3
2
1
Total % crowded
or very crowded
% crowded
(i.e., more than
one person per room)
% very crowded
(i.e., more than 1.5 persons per room)
<50
50-59
60-69
70-79
80-99
100-119
120-149
150-199
200-299
300+
Rent